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No. OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1994

TYSON JOHNSON, ROBERT DEEVEY, AND JOHN PAYNE, *Petitioners*

v.

HOUSTON JONES, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK F. SMOLENS
Flynn, Murphy, Ryan & Seyring
Suite 3232
30 North LaSalle Street
Chicago, Illinois 60602
(312) 372-3800

CHARLES A. ROTHFELD*
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 778-0616

**Counsel of Record*

QUESTION PRESENTED

Whether, in an action under 42 U.S.C. § 1983, the denial of a public official's motion seeking summary judgment on qualified immunity grounds because the plaintiff failed to adduce any evidence showing wrongful conduct may be challenged in an interlocutory appeal.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is reported at 26 F.3d 727. The opinion of the district court (App., *infra*, 4a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1994. The petition for a writ of certiorari therefore is due on or before September 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

STATEMENT

Petitioners are law enforcement officers who were sued under 42 U.S.C. § 1983 for the allegedly excessive use of force. They sought summary judgment on good faith immunity grounds, asserting that their actions did not violate clearly established law because there was no evidence that their conduct was inconsistent with *any* legal standard. The district court denied the motion. The court of appeals then held that it lacked jurisdiction to entertain petitioners' interlocutory appeal. This holding is squarely inconsistent with the decisions of other Circuits, is in tension with the rulings of this Court, and threatens to frustrate the purposes of the qualified immunity doctrine. Further review therefore is in order.

1. On November 6, 1990, John Heidelmeier, an officer of the Villa Park, Illinois, police department, responded to a report of an apparently intoxicated man in or near an intersection. When Heidelmeier arrived at the scene he found plaintiff beating his head or forehead against the door of a building. Although some subsequent facts are in dispute, it is clear that an altercation ensued and that Heidelmeier attempted to arrest and handcuff respondent. Four more Villa Park police officers (the three petitioners here and Genaro Esposito) soon arrived and assisted Heidelmeier in handcuffing respondent. App., *supra*, 5a. After arriving at the police station respondent was treated for trauma and several broken ribs. *Ibid.*

Respondent subsequently was charged in state court with the criminal offenses of disorderly conduct, battery, and resisting arrest; he asserted as a defense that he lacked the requisite mental state for the offenses charged because he was suffering an adverse insulin reaction at the time of his arrest. App., *infra*, 6a. He testified that he had no recollection of what transpired from the time he first felt the insulin reaction until he noticed that he was being dragged up the stairs of the police station. The state trial court

> found that [respondent] came into contact, struck, and resisted a peace officer. Although the judge found [petitioners'] testimony credible and felt that all other elements of the charges against [respondent] had been

> proven, he concluded that the State had not proven beyond a reasonable doubt that [respondent] acted knowingly. The basis of the finding as to mental state was the testimony concerning [respondent's] diabetes and insulin shock.

Ibid.

Respondent then brought this 42 U.S.C. § 1983 action in the United States District Court for the Northern District of Illinois against petitioners, Heidelmeier, and Esposito. In relevant part, respondent alleged that the officers used excessive force against him and that they were responsible for an illegal arrest, false imprisonment, and malicious prosecution. The officers testified that no one beat, struck or abused respondent during the arrest; the three petitioners also testified that their involvement with respondent ended after the arrest was effected and that they saw no one abuse respondent at the police station. App., *infra*, 5a. Respondent, in contrast, while asserting that he had been beaten at the time of arrest and at the police station, testified that he was experiencing an insulin reaction when arrested and therefore "disclaim[ed] recollection of specific actions taken by defendants." *Id.* at 6a. He did deny resisting arrest (*ibid.*) and said he recalled seeing Heidelmeier and Esposito while being beaten at the police station. *Ibid.*[1]

All of the defendants sought summary judgment, arguing as to the excessive force claim that there was absolutely no evidence that they had abused respondent; as for the false arrest and related claims, the defendants contended that the existence of probable cause for arrest established their qualified immunity from suit. The district court denied the motion. On the claim of excessive force, the court concluded that "[p]laintiff lacks eyewitness testimony supporting his theory of the events surrounding his arrest, but there is sufficient circumstantial evidence supporting his theory of the

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[1] Respondent's doctor testified that respondent probably would have been weakened by an insulin reaction, but that in a small percentage of cases "a person undergoing an insulin reaction may show greater than normal strength." App., *infra*, 6a. The motor deficit from the reaction would resemble that caused by intoxication. *Ibid.*

case. While the culpability of particular defendants may vary, on the present record, it cannot be determined whether the claims against them should be dismissed." App., *infra*, 8a. The court also held that the false arrest claim should be tried, finding "there is at least some possibility plaintiff could prove lack of probable cause." *Id.* at 10a.

2. Petitioners (but not Heidelmeier and Esposito) filed an interlocutory appeal challenging the denial of summary judgment; as the court below explained, the appeal "assert[ed] the defense of official immunity." App., *infra*, 1a. The court of appeals, however, dismissed the appeal as to the excessive force claim for lack of jurisdiction. The court noted that petitioners "are contending that they did not commit the acts of which plaintiff accuses them" and held that "[d]efendants do not deny that *if* they beat the plaintiff * * * then they lack immunity. *Whether* they beat the plaintiff is a question that must be resolved in the district court before it may be reviewed on appeal." *Id.* at 2a (emphasis in original). The court premised this holding on the conclusion that "[a] cry of 'we didn't do it' does not present any distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity." *Id.* at 1a-2a.[2]

The court's holding in this case followed from its prior decision in *Elliott* v. *Thomas*, 937 F.2d 338 (7th Cir. 1991), cert. denied, 112 S. Ct. 1242 (1992), that "defendants may urge only legal issues" on interlocutory qualified immunity appeals. App., *infra*, 1a. In *Elliott*, the court had reasoned that "the interlocutory appeal to vindicate the [qualified immunity] right not to be tried is unavailable when there is no legal uncertainty; there is no separate 'right not to be tried' on the question whether the defendants did the deeds alleged." 937 F.2d at 341. The rule announced in *Elliott*, and applied in this case, therefore is that a defendant may appeal on grounds of qualified immunity only when he contends

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[2] The court did, however, reverse the district court's denial of summary judgment on the false arrest claim. It found from the undisputed evidence that probable cause to arrest existed and held that the district court erred in denying the motion on the ground that "the plaintiff might come up with more evidence before trial." App., *infra*, 2a.

"that he acted in the shadow of legal uncertainty"; such an appeal is not cognizable in the Seventh Circuit when the defendant's argument is that he "had nothing to do with the events of which [the plaintiff] complains." *Id.* at 342. The court therefore remanded this case for trial.

REASONS FOR GRANTING THE PETITION

This case presents a recurring issue of considerable practical importance. The law enforcement petitioners in this case moved for summary judgment, asserting that they were entitled to qualified immunity because plaintiff failed to establish that their actions had violated clearly established law -- or, indeed, that their actions had violated any law at all. The Seventh Circuit's decision that the district court's denial of such a motion may not be challenged in an interlocutory appeal is irreconcilable with the express contrary holdings of at least five other Circuits. It also is in clear tension with this Court's repeated recognition that "[e]ven if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Because that decision threatens to impose substantial additional burdens on public officials by precluding "the dismissal of insubstantial suits without trial" (*Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982)) — a principal purpose of the qualified immunity doctrine — review by this Court plainly is warranted.

A. The Decision Below Cannot be Reconciled With the Holdings of Other Courts of Appeals

The court below held that "defendants may urge only legal issues" in interlocutory immunity appeals, opining that "[a] cry of 'we didn't do it' does not present a distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity." App., *infra*, 1a-2aa. The Seventh Circuit therefore is of the view that "interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainty," reasoning that it is inappropriate for immunity claims to turn on the appellate court's "comb[ing] through the factual record." *Elliott*, 937 F.2d at 341. That precise conclusion,

however, has been *expressly* rejected by at least five courts of appeals — the First, Fourth, Eighth, Ninth and Tenth. And the District of Columbia Circuit has *exercised* appellate jurisdiction over interlocutory immunity appeals where the gist of the defendants' argument was the factual one that they did not commit the constitutional tort. The decision below cannot be reconciled with these decisions.[3]

1. a. In *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988), the First Circuit addressed a state prisoner's Section 1983 claim that the defendant police officers beat him while quelling a prison disturbance. See *id.* at 127. The district court had denied the defendants' motion for summary judgment on qualified immunity grounds. On interlocutory appeal, the defendants' "main arguments [were] that the undisputed facts gathered through discovery show that they could not have violated clearly established law *because they had no contact, or only minimal contact, with [the plaintiff]*, or that any contact with him was no more than the result of their good faith efforts to quell a prison disturbance." *Ibid* (emphasis added). The court of appeals thus posed "[t]he question before us [as] whether, in light of th[e] [discovery] materials [before the district court], the district court erred in finding a genuine issue of material fact as to defendants' entitlement to qualified immunity." *Id.* at 128.

In analyzing the case, then-Chief Judge Campbell, writing for the court, began by explaining that the constitutional law governing the defendants' conduct was "clearly established" at the time of the events giving rise to the suit. 863 F.2d at 129. But the court nevertheless went on to hold that the exercise of appellate

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[3] This Court's denial of certiorari in *Elliott* should not be taken as an indication that review of the issue presented here is unwarranted. To the contrary, the respondent in that case opposed certiorari principally on the ground that the case had become moot during the pendency of the petition because the plaintiff's claims had been tried and a verdict returned on the merits in petitioners' favor. See Br. in Opp., No. 91-690, at 1-4. While respondent in *Elliott* also urged the Court to deny review on the ground that the decision was correct, he acknowledged that the Seventh Circuit had decided "an issue of importance to section 1983 plaintiffs, as to which the Courts of Appeals have disagreed." *Id.* at 1.

jurisdiction was appropriate under *Anderson* v. *Creighton*, 483 U.S. 635 (1987), and *Mitchell*, accepting the defendants' submission that "'the qualified immunity right not to stand trial is just as effectively lost if an appellate court does not entertain an appeal of a legally erroneous denial of summary judgment as it is if the district court declines to rule itself on the summary judgment motion.'" *Id.* at 132. The court therefore "conclude[d] that we have jurisdiction to review a district court's denial of qualified immunity on grounds that a genuine issue of material fact exists as to the factual predicate of a qualified immunity claim." *Ibid.*

The court then proceeded to the merits, explaining that "[f]inding that we have jurisdiction to do so, we now address the question of whether, reading the pretrial record in the light most favorable to [plaintiff], a genuine issue of material fact exists as to whether defendants' conduct violated [plaintiff's] clearly established rights." 863 F.2d at 133. After a close review of the record (see *id.* at 134-136), the court found that such an issue of fact existed as to several defendants because "all admit having physical contact with [plaintiff] during the time [plaintiff] was repeatedly beaten." *Id.* at 134. But the court also held that two other defendants (Campbell and Furlone) were entitled to qualified immunity because "there is no evidence at all in the record showing that [Campbell] had any contact with [plaintiff]" and Furlone "likewise had no physical contact with [plaintiff]." *Id.* at 133. "*Because the undisputed facts show that Furlone and Campbell did not cause [plaintiff's] injuries*, their conduct did not violate clearly established law and thus they are entitled to qualified immunity." *Ibid* (emphasis added) (footnote omitted).

Indeed, as to these latter two defendants the court specifically explained:

> This is a case where it has been shown not only that these two defendants did not violate law *clearly established* at the time of the event, but did not violate the law *at all*, then or now. It might be argued that defendants' right to prevail "on the merits" forecloses their right to prevail on qualified immunity, thus barring the present interlocutory appeal. However, "the merits" and the issue of qualified immunity are inexorably

> intertwined in this instance. To afford the two defendants immunity only if the law had been a little less favorable to them would seem ridiculous.

Id. at 133 n.9 (emphasis in original).

The First Circuit's holding that interlocutory appellate jurisdiction exists to consider Section 1983 defendants' claims of (as the court below put it) "we didn't do it" was in no sense off-hand or ill-considered. To the contrary, the court rejected the dissenting view of then-Judge Breyer that "a defendant is not entitled to a 'qualified immunity' interlocutory appeal in respect to a pure fact-based 'evidence sufficiency' ruling." 863 F.2d at 139 (Breyer, J., dissenting). Judge Breyer explained — quite correctly — that there was "no real issue on appeal, in respect to the defendants Campbell and Furlone, other than the purely factual issue whether the evidence shows that they were present at the time plaintiff was hurt." *Id.* at 141. This, he believed, "is not an appropriate issue for us to resolve on an interlocutory appeal." *Ibid.*[4] The majority, of course, established the contrary view as the law in the First Circuit.

Unwin therefore is indistinguishable from this case. In both, the plaintiff alleged that he was beaten by defendants. In both, the constitutional rule — beatings are impermissible — was clearly established at the time of the challenged conduct. In both, the defendants claimed that they were entitled to qualified immunity because, as a factual matter, they had no contact with the plaintiff. But in this case, the court held that it lacked appellate jurisdiction; in *Unwin*, the court held that it *had* jurisdiction and proceeded to address the merits of the defendants' factual claims.

b. The First Circuit has adhered to this approach consistently. In *Caro* v. *Aponte-Roque*, 878 F.2d 1 (1st Cir. 1989), the plaintiff challenged an assertedly retaliatory discharge; claiming immunity, the defendant denied liability on the wholly factual ground that he lacked a retaliatory motive. Then-Judge

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[4] Then-Judge Breyer acknowledged, however, that "[t]he Supreme Court has not directly focused upon this question." 863 F.2d at 137 (discussing *Mitchell*); see *id.* at 138 (discussing *Anderson*).

Breyer, now writing for the court, noted that the law governing retaliatory discharges was settled and that "[t]he *only* issue in the case concerns motive." *Id.* at 2 (emphasis in original). And relying on *Unwin*, the court restated the holding that a "court should examine evidence in respect to factual issues on interlocutory appeal of a denial of summary judgment." *Ibid.* The court therefore explained that "[t]he single question that we must decide is whether the plaintiffs, in opposing the [defendant's] motion for summary judgment, demonstrated the existence of a 'genuine' and 'material' issue of fact warranting the district court's proceeding to trial on the 'qualified immunity' question." *Ibid.* After a careful review of the record (see *id.* at 3-4), the court held that a genuine issue of material fact did exist.

Similarly, in *Rogers* v. *Fair*, 902 F.2d 140 (1st Cir. 1990), the plaintiff claimed that prison authorities discriminated on the basis of religion in denying him a furlough. The defendants' motion for summary judgment on immunity grounds was denied. As the court described the case,

> Appellants ask us to reverse the denial of summary judgment because *there is no evidence that their conduct could have violated the rights of the plaintiff even if those rights were clearly established.* * * * *The only question, therefore, is whether the plaintiff has presented sufficient facts to survive summary judgment on the issue of whether the religion of the sponsors was improperly considered in the denial of furlough.* Because plaintiff, the nonmoving party, has failed to meet the normal summary judgment standard, we reverse and grant summary judgment to the defendants.

Id. at 142 (emphasis added). Relying on *Unwin*, the court noted that, assuming the governing constitutional law was settled, the plaintiff "must present more than mere [factual] allegations. He has not done so." *Id.* at 143. The court added that "[w]e have scoured the record on summary judgment and find no facts that [plaintiff] can use to support his allegations." *Ibid.* The court therefore granted judgment for the defendants.

Most recently, in *Febus-Rodriguez* v. *Betancourt-Lebron*, 14 F.3d 87 (1st Cir. 1994), the court reaffirmed that, when the

defendant appeals from the denial of a summary judgment motion asserting good faith immunity, "we must determine whether the plaintiffs have introduced sufficient evidence to create a genuine issue of material fact that [the defendants] violated [plaintiff's] constitutional rights." *Id.* at 91. The case involved a claim that a police superintendent and mayor failed adequately to supervise and train law enforcement officers; after a careful review of the record (see *id.* at 92-94), the court reversed and granted summary judgment because plaintiffs "failed to produce sufficient evidence to create a triable issue." *Id.* at 94. See *id.* at 95 ("the plaintiffs have not proffered any evidence that [the defendant] had actual or constructive knowledge of any training or supervisory deficiencies"). There was no suggestion that the controlling constitutional law was unclear.

2. The Eighth Circuit reached an identical conclusion in *Wright* v. *South Arkansas Regional Health Center, Inc.*, 800 F.2d 199 (8th Cir. 1986). There, the plaintiff brought a Section 1983 action claiming that he had been discharged in retaliation for the exercise of his First Amendment rights; "[d]efendant's motion for summary judgment was based on the argument that there was no substantial evidence to support this theory." *Id.* at 202-203.

Writing for the court, Judge Arnold noted that "there is no doubt that the right to be free from official retaliation for the exercise of First Amendment rights has been clear all along." 800 F.2d at 203. Judge Arnold accordingly explained that

> The question presented is thus both less clearly "legal," as opposed to "factual," than the issue in *Mitchell*, and less clearly separable from the merits, one of the requirements for immediate appealability under *Cohen*. We nevertheless hold that an interlocutory appeal is proper. If this is a step beyond *Mitchell*, it is a small one, and one fully consistent with the spirit and purpose of the Supreme Court in that opinion. It is important for public officials to be shielded from the burden of trial on insubstantial claims. Their right not to be forced to trial will be lost if an immediate appeal is not allowed. And the issue is, on close analysis, separable from the merits. To put it in terms of the present case, *the issue is not*

> *whether defendant was improperly motivated in fact, but, rather, whether, when all the facts are viewed in the light most favorable to plaintiff, there is any genuine issue, triable to a jury, of improper motivation.* There is a sense in which this sort of question is one of "law," just as the question whether someone is entitled to a directed verdict is in some sense one of "law."

Id. at 203 (emphasis added).

With this standard in mind, the court went on to review the record. It found that "[p]laintiff points to no evidence that [the defendant's] motivation was unconstitutional." 800 F.2d at 204. The court therefore concluded that "the record simply does not create a genuine issue of material fact." *Id.* at 205. It accordingly reversed the district court's judgment and directed dismissal of the complaint. *Ibid.* Again, that case is not distinguishable from this one: the controlling law was settled, and the only issue was a factual one (to paraphrase the Seventh Circuit's words, the defendant's claim of "I didn't think it"). And again, the Eighth Circuit found jurisdiction proper; the Seventh Circuit did not.

Like the First Circuit, the Eighth Circuit has consistently adhered to this approach. Thus in *Tagstrom* v. *Enocksen*, 857 F.2d 502 (8th Cir. 1988), the plaintiff alleged that defendant exhibited deliberate indifference to the medical needs of a person injured in a high speed chase. The district court denied a motion to dismiss on immunity grounds, finding that there was "circumstantial evidence" of indifference. See *id.* at 503. The court of appeals reversed. Reviewing the discovery materials, the court found that "[t]here is nothing in the record to indicate that [the defendant] deprived [plaintiff] of any constitutional right" because defendant was, as a factual matter, "in no way deliberately indifferent to [plaintiff's] medical needs." *Id.* at 504, 503. The court therefore held that "'[t]he facts shown by [the plaintiff] simply do not create a triable issue of fact.'" *Id.* at 504, quoting *Wright*, 800 F.2d at 205.

The Eighth Circuit's other decisions in the area also have hewed to *Wright*. See *Kelly* v. *Bender*, 23 F.3d 1328, 1330 (8th Cir. 1994) (citing *Wright*, "[w]e have jurisdiction over this appeal because, although largely fact-based, it presents the legal question

whether [plaintiff] raised a genuine issue of material fact regarding whether the [defendants'] conduct violated his clearly established rights"); *Johnson-El* v. *Schoemehl*, 878 F.2d 1043, 1050 (8th Cir. 1989) (plaintiff sued mayor, along with other public officials, challenging conditions in municipal jail; on appeal from denial of motion for summary judgment on good faith immunity grounds, court held that "we require that the plaintiffs point to some specific action or particular form of inaction which would make the mayor liable under [the settled] standard. * * * Plaintiffs have failed to do so in their amended complaint or supplementary materials. We therefore grant summary judgment for [the] Mayor."); *Anderson v. Roberts*, 823 F.2d 235, 237-38 (8th Cir. 1987) (court found that the legal standards applicable to plaintiffs' claim that defendant had inadequately trained his subordinates were clear, and that the question before the court was whether defendant had "engaged in any conduct in violation of that clearly established law"; following *Wright*, the court found that it had appellate jurisdiction).

3. The Ninth Circuit has likewise held that interlocutory appellate jurisdiction lies to determine "whether, after discovery, [plaintiff] made a sufficient evidentiary showing of the occurrence of the alleged conduct to create factual issues requiring trial." *Burgess* v. *Pierce County*, 918 F.2d 104, 105 (9th Cir. 1990). In *Burgess*, another case involving a claim of retaliatory discharge, the court found that the governing constitutional law was "clearly established" at the time of the conduct giving rise to the suit. *Id.* at 106. The court went on to hold that, "[s]ince [defendant's] summary judgment motion was denied after discovery, we must also *determine whether the trial court correctly held [plaintiff] had presented a genuine issue of fact as to whether defendants had engaged in the alleged conduct* violating plaintiff's clearly established constitutional right." *Ibid.* (emphasis added).

Expressly addressing the question of appellate jurisdiction, the court explained that "[t]his review is proper under the collateral order doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). * * * All circuits facing the issue have held that on appeal from a denial of summary judgment after discovery *the court must consider whether there is a genuine issue of fact as to whether defendant engaged in the conduct* violating plaintiff's clearly established constitutional right." 918

F.2d at 106 n.3 (emphasis added). The court proceeded to engage in a close review of the record (see *id.* at 106-107 n.4) before concluding that the plaintiff in that case had "made a sufficient evidentiary showing to create a genuine issue of material fact as to his allegations." *Id.* at 106. It therefore is no surprise that the Ninth Circuit has very recently cited *Burgess* for the proposition that "[d]efendants are entitled to summary judgment based on qualified immunity if * * * there is no genuine issue of material fact as to whether defendant engaged in conduct violating plaintiffs' clearly established constitutional rights." *Armendariz* v. *Penman*, 1994 WL 393477 (9th Cir. Aug. 1, 1994), at *2.

4. The Tenth Circuit has expressly endorsed this approach. In *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988), a *Bivens* action, that court concluded that *Anderson* "compels us to take an appeal * * * in all cases in which the denial [of summary judgment] is grounded upon a finding that disputed material facts exist in the case." *Id.* at 719. The court explained that the Eighth Circuit's decision in *Wright* "illustrates the problem and the proper resolution." *Ibid.* As the Tenth Circuit characterized it, "[i]n *Wright*, plaintiff sued his health center employer, alleging that the employer violated his First Amendment rights by firing him in political retaliation. The constitutional right at issue was clearly established; what the parties disputed on interlocutory appeal, which the Eighth Circuit allowed, was whether sufficient evidence supported the claim that defendant's acts were improperly motivated." *Ibid.*

The Tenth Circuit applied this principle in *Austin* v. *Hamilton*, 945 F.2d 1155 (10th Cir. 1991), which involved a *Bivens* claim of unjustified detention. Relying on *DeVargas*, the court took jurisdiction over an immunity appeal "even though the district court based its denial of the [summary judgment] motion on a finding that disputed material facts exist in the case." *Id.* at 1157. The court explained that at least some of the immunity claims in the case "do not implicate unsettled law," but rather turned on what the court characterized as the factual question of the reasonableness of the length of plaintiffs' detention. *Id.* at 1162. After reviewing the record, the court went on to hold that "under the circumstances of this case, in which the specific facts are unsettled and disputed regarding both the length [of detention] and the reasons for the

delay [in releasing plaintiffs], the district court's denial of summary judgment was proper." *Id.* at 1162-1163 (footnote omitted).

5. The Fourth Circuit has reached the same conclusion. In *Turner* v. *Dammon*, 848 F.2d 440 (4th Cir. 1988), the plaintiff brought a Section 1983 action alleging that a series of administrative searches of his bar violated the Fourth Amendment; the district court denied the defendants' motion to dismiss on the factual ground that "the record raised a triable issue as to whether improper motives on the part of the defendants rendered the series of bar checks a violation of the plaintiffs' clearly established property right." *Id.* at 442. The Fourth Circuit found that it had jurisdiction to entertain the appeal.

In an opinion by Judge Wilkinson, the court held that "[w]here the acts alleged by the plaintiff do constitute a violation of clearly established rights, a defendant is entitled to summary judgment [on immunity grounds] if the record does not create a genuine issue as to whether the defendant in fact committed those acts." *Id.* at 443. The court went on to hold that appellate jurisdiction existed to review the denial of such a summary judgment motion; relying on *Wright*, the Fourth Circuit explained that "we must inquire 'whether, when all the facts are viewed in the light most favorable to the plaintiff, there is a genuine issue, triable to a jury,' of a clearly established constitutional violation." *Id.* at 444. Without suggesting that the controlling constitutional law was unsettled, the court of appeals proceeded to engage in this inquiry. It concluded that "on this record [two defendants] are not entitled to qualified immunity and that an issue of triable fact as to these defendants' violation of settled Fourth Amendment principles appears to have been presented" (*id.* at 447) because those defendants may have engaged in a pattern of harassing searches (see *id.* at 445, 447). The court also found that, as to three other defendants, "the summary judgment record establishes their entitlement to qualified immunity" (*id.* at 447) because, as a factual matter, they were involved only in small numbers of searches (see *ibid*) or because "[n]either the allegations nor the affidavits in the record suggest that [they were] involved" is harassing conduct. *Id.* at 448.

6. In addition, the District of Columbia Circuit, while not explicitly addressing the issue of appellate jurisdiction, has

exercised jurisdiction over an appeal challenging the denial of a fact-based summary judgment motion asserting qualified immunity. In *Martin* v. *D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C. Cir.), vacated in part and en banc rehearing granted, 817 F.2d 144, original opinion reinstated, 824 F.2d 1240 (1987), the plaintiff brought a *Bivens* action asserting that federal law enforcement officers conspired to deny him both access to the courts and due process. See 812 F.2d at 1427-1428. The district court denied the defendants' motion for summary judgment on the ground that the controlling constitutional law was clearly settled. See *id.* at 1428. The court of appeals, in an opinion by then-Judge Ruth Bader Ginsburg, recognized that the law was indeed established, noting that "[a] reasonable law enforcement officer would surely know that an arrest or prosecution undertaken to deter an individual from pursuing bona fide civil claims would trample upon clearly established constitutional rights." *Id.* at 1432.

The court nevertheless went on to consider the defendants' factual claims. The court explained that the crucial element of the plaintiff's claim concerned the defendants' motive. 812 F.2d at 1431. After a close review of the record (see *id.* at 1435), the court concluded that plaintiff's evidence "was insufficient * * * to demonstrate the existence of a 'genuine issue' as to the reasonableness and good faith of the Capitol Police" (*ibid*); plaintiff's "fact recitations, as they now stand, are insufficiently probative of the alleged unconstitutional motive to warrant denial of the Capitol Police officers' motion for summary judgment." *Id.* at 1436. The court remanded the case to give the plaintiff an opportunity to adduce additional evidence on this factual issue. *Id.* at 1436-1438. The court nowhere suggested that it had any doubts about its jurisdiction to render this decision even though the appeal contained, in the Seventh Circuit's formulation, "nothing but a factual issue" (*Elliott*, 937 F.2d at 342) — whether defendants acted with a particular state of mind.[5]

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[5] Judge Starr, dissenting in part, also raised no doubts about appellate jurisdiction; to the contrary, he would have reversed the district court's decision outright and not remanded the case for further factual development. See 812 F.2d at 1442 (Starr, J., concurring in part and dissenting in part).

7. The issue presented here has caused considerable confusion in two other Circuits. In *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990), cert. denied, 111 S. Ct. 2827 (1991), the Third Circuit stated:

> Although we have not previously addressed this issue explicitly, we believe that we implicitly have held that *Anderson* requires appellate inquiry into whether the plaintiff has adduced evidence sufficient to create a genuine issue of material fact as to whether the defendant official engaged in the conduct alleged to have violated a clearly established right. * * * We conclude that under *Anderson's* fact specific standard for qualified immunity, as construed and applied by our precedents, we must determine whether the district court properly denied defendants' claims of qualified immunity in part by analyzing the evidence adduced by plaintiff as to the conduct of the defendants.

Id. at 1111 (citations omitted). The court applied this principle to the qualified immunity claim of defendant Schwartz, whose primary defense was that he had not committed the acts alleged by the plaintiff: he asserted that his involvement in the events at issue was minimal and that defendant Grabowski was primarily responsible. See *id.* at 1112. The Third Circuit, reversing the district court, held that Schwartz was entitled to qualified immunity, largely because of his non-involvement in the events giving rise to the action. See *id.* at 1115-16, 1117 n.12. More recently, however, the Third Circuit, in *Giuffre* v. *Bissell*, 1994 WL 401389 (3d Cir. Aug. 4, 1994), at *18, relied on the Seventh Circuit's *Elliott* decision for the proposition that an "'I didn't do it' defense to [a plaintiff's] [constitutional] claim is not cognizable as a declaration of qualified immunity." The court made no attempt to reconcile its analysis with its prior holding in *Brown*.

Similarly, in the Sixth Circuit case of *Ramirez v. Webb*, 835 F.2d 1153 (6th Cir. 1987), some of the defendants submitted affidavits stating that "they had no knowledge of and took no part in" the acts of misconduct alleged by the plaintiffs. *Id.* at 1158. Citing *Mitchell*, the Sixth Circuit held: "If these defendants did not participate in the actions that allegedly violated plaintiffs' rights,

then they cannot be liable as a matter of law. Therefore, this court has jurisdiction to entertain this contention of qualified immunity." *Id.* at 1159. But that court, in an unpublished opinion, also has cited *Elliott* for the principle that "[t]he essence of a qualified immunity defense is that what the actor is claimed to have done may be wrong under present standards, but that a reasonable actor would not have known it to be wrong at the time. The denial of a motion asserting a general defense on the merits is not subject to interlocutory appeal." *Stone* v. *Holzberger*, 1994 WL 175420 (6th Cir. Jan. 6, 1994), at *7 n.5. The court did not cite to, and made no attempt to distinguish, its contrary decision in *Ramirez*.[6]

8. Against this background, it is undeniable that there is an irreconcilable conflict in the Circuits. The Seventh Circuit has held that an interlocutory immunity appeal is cognizable only when the defendant "contend[s] that he acted in the shadow of legal

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[6] The law is unclear in two other Circuits. In *Kaminsky* v. *Rosenblum*, 929 F.2d 922 (2d Cir. 1991), upon which the Seventh Circuit relied in *Elliott* (see 937 F.2d at 342), the Second Circuit did state that an appeal "must be dismissed for lack of appellate jurisdiction" where it challenges the denial of summary judgment in a case involving "unresolved factual issues." 929 F.2d at 924. At the same time, however, the court went on to review the record, observing that "the district court concluded that the resolution of the immunity defense involved disputed factual questions unable to be resolved on summary judgment. We agree." *Id.* at 925. See *id.* at 927. It thus appears that the Second Circuit would accept jurisdiction in a case presenting no genuine dispute of fact. Similarly, the Eleventh Circuit held that an appeal was not permitted where the district court "denied defendants' claim of qualified immunity because the case required substantial factual development before it could be determined with finality whether [plaintiff] had been subjected to constitutional deprivation and if so, whether some or all of the defendants were entitled to the benefit of qualified immunity." *Riley* v. *Wainwright*, 810 F.2d 1006, 1007 (11th Cir. 1987) (per curiam). It is not clear whether the court believed interlocutory appeal improper when facts are in dispute or whether it simply concluded that the record did not permit resolution of the case on summary judgment. See also *Jasinski* v. *Adams*, 781 F.2d 843, 848 (11th Cir. 1986) (court entertained appeal and held that summary judgment was properly denied where there was a "factual dispute" on the existence of probable cause to search).

uncertainty" and "that *Mitchell* does not authorize an appeal to argue 'we didn't do it.'" *Elliott*, 937 F.2d at 342. See App., *infra*, 1a-2a. In contrast, the First, Fourth, Eighth, Ninth, and Tenth Circuits have expressly found appellate jurisdiction in cases where there was no legal uncertainty and the claim was no more and no less than "we didn't do it" (or, in the retaliatory discharge cases, that "we didn't have a bad motive when doing it"). The District of Columbia Circuit has exercised jurisdiction in identical circumstances. The question, which has now been litigated across the Circuits, plainly is an important one that arises with great frequency. In these circumstances, review by this Court is warranted.

B. The Decision Below is in Conflict With This Court's Decisions

1. Given the inconsistency of the Seventh Circuit's approach with the clear weight of authority in the courts of appeals, it is hardly a surprise that the decision below also is in clear tension with this Court's decisions. In fact, this Court has twice recognized that if, after discovery, the plaintiff has failed to uncover evidence that the defendant did what he was alleged in the complaint to have done, the defendant may obtain summary judgment on the basis of qualified immunity. In *Mitchell*, the Court held that "[e]ven if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." 472 U.S. at 526. Similarly, in *Anderson*, the Court stated that "if the actions [the defendant] claims he took are different from those the [plaintiffs] allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [the defendant's] motion for summary judgment on qualified immunity grounds can be resolved." 483 U.S. at 646 n.6. The Court thus indicated that a summary judgment motion would lie after discovery.

Accordingly, qualified immunity protects the official whose actions did not violate clearly established law (see *Harlow*, 457 U.S. at 818), whether the reason is that the law was in a state of flux or simply that the official did not commit the acts alleged by

the plaintiff. The necessary implication of this conclusion is that an appeal should be available when such a summary judgment motion is denied. After all, *Mitchell* and *Anderson* indicate that a defendant is entitled to summary judgment *on qualified immunity grounds* if the plaintiff fails to adduce evidence creating a genuine issue of fact on the question whether the defendant committed acts that violated clearly settled law. And "because '[t]he entitlement is an *immunity from suit* rather than a mere defense to liability'" (*Hunter* v. *Bryant*, 112 S. Ct. 534, 536 (1992), quoting *Mitchell*, 472 U.S. at 526 (emphasis added by the Court)), the defendant should have an opportunity to test on appeal a wrongful denial of that entitlement by the district court.

Any other conclusion, as the First Circuit noted in *Unwin*, will lead to perverse results. We know from *Anderson* that the immunity inquiry must look to the particular conduct engaged in by the defendant. See 483 U.S. at 641. A court therefore must determine whether what the defendant *actually did* violated clearly established law; as the Seventh Circuit itself acknowledged (see *Elliott*, 937 F.2d at 342), every Circuit has rejected the rule of *Bonitz* v. *Fair*, 804 F.2d 164 (1st Cir. 1986), overruled by *Unwin*, 863 F.2d at 130-133, which had held that the courts of appeals could not look beyond the allegations of the complaint in reviewing the denial of a motion seeking summary judgment on immunity grounds. Instead, courts of appeals examine the entire summary judgment record.

So, for example, if a plaintiff alleges that the defendant engaged in a particular act (say, that he conducted a warrantless search) and the defendant responds that he conducted a different act altogether (say, that he obtained a warrant before conducting the search), the court will have to determine whether the plaintiff's version is supported by the record before determining whether the defendant's conduct was inconsistent with clearly established law. If the plaintiff's version finds no support in the record, the court will have to determine whether the conduct as described by the defendant violated clearly settled law. And there is no doubt that appeal would lie if the legality of the defendant's conduct had been unclear, because the question then would be whether the defendant had "acted in the shadow of legal uncertainty." *Elliott*, 937 F.2d at 342. In that light, it makes no sense at all to deny the defendant

an appeal because it was clear that his conduct was *legal*; "[t]o afford the * * * defendant[] immunity only if the law had been a little less favorable to [him] would seem ridiculous." *Unwin*, 863 F.2d at 133 n.9.

2. The Seventh Circuit nevertheless appeared to believe that an appeal from a denial of a qualified immunity summary judgment motion premised on such a defense is improper because it presents no issue different from the merits. The court reasoned that "there is no separate 'right not to be tried' on the question whether the defendants did the deeds alleged; that is *precisely* the question for trial." *Elliott*, 937 F.2d at 341 (emphasis in original). As this Court recognized in *Mitchell*, however, "a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue." 472 U.S. at 528-29. This is so because "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28. And as the Eighth Circuit explained, "the issue is, on close analysis, separable from the merits. * * * [T]he issue is not whether defendant [engaged in the acts alleged] in fact, but, rather, whether, when all the facts are viewed in the light most favorable to plaintiff, there is any genuine issue, triable to a jury, of improper [conduct]." *Wright*, 800 F.2d at 203.

For similar reasons, the Seventh Circuit was wrong in reasoning that a defense that the defendant did not commit the acts alleged by the plaintiff raises factual issues that do not qualify for interlocutory appeal under *Mitchell*'s holding that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291." 472 U.S. at 530. When there is no genuine issue of material fact, the defendant's entitlement to summary judgment *is* an issue of law under Fed. R. Civ. P. 56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This principle applies to motions for summary judgment

based on qualified immunity just as much as it does to other summary judgment motions. See, *e.g.*, *Wright*, 800 F.2d at 203; *Martin*, 812 F.2d at 1434. A properly supported qualified immunity summary judgment motion based on a defense that the defendant did not commit the acts alleged by the plaintiff thus presents a "question of law." *Elder* v. *Holloway*, 114 S. Ct. 1019, 1023 (1994).

3. The policies underlying this Court's qualified immunity decisions would be thwarted by a rule precluding immediate appeal from the denial of a summary judgment motion, made after discovery, premised on the defense that the defendant did not commit the acts alleged by the plaintiff. One of the primary purposes of qualified immunity is to permit "the dismissal of insubstantial lawsuits without trial." *Harlow*, 457 U.S. at 814. "The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation * * * only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). As a consequence, the Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter*, 112 S. Ct. at 536.[7]

Surely, as a matter of policy, an official who did nothing even arguably wrong is at least as deserving of the interlocutory appeal authorized by *Mitchell* as is an official whose conduct was arguably, but not clearly, unconstitutional at the time he acted. And where the plaintiff cannot adduce any evidence establishing that the official committed the acts alleged, a motion for summary judgment should be granted, or the appeal of its denial allowed, to further the policy served by *Mitchell* of sparing the official and the courts the time and expense of a trial, the result of which is a foregone conclusion. "[T]he purpose of qualified immunity is to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the

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[7] A governmental defendant's right not to stand trial is just as effectively lost if the court of appeals does not entertain an appeal from a legally erroneous denial of summary judgment, as here, as it is if the district court declines to rule on the summary judgment motion in the first place. *Unwin*, 863 F.2d at 132.

submission of facts to a jury." *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (Powell, J., sitting by designation) (citing *Mitchell*, 472 U.S. at 526).

The contrary rule announced by the Seventh Circuit, if allowed to stand, would have significant practical consequences. Cases like *Mitchell*, in which the constitutionality of the defendant's actions is genuinely unsettled at the time he acts, are relatively rare. More common are cases involving factually insupportable accusations by disgruntled plaintiffs, such as the allegations by respondent here. As this Court recognized in *Anderson*, *Mitchell*, *Davis*, and *Harlow*, such cases, if not expeditiously terminated, pose a substantial danger of chilling public officials in the legitimate exercise of their governmental duties. Yet it is appeals from precisely this class of cases that the court below has refused to entertain. This is a perverse result, for it forces the victims of the most insubstantial claims to go through trial.

In addition, the decision below does more than add to the burdens of public officials; it also creates a complex rule that will, in practice, be extraordinarily difficult to apply. It often will be unclear whether the defendant genuinely "acted in the shadow of legal uncertainty" (*Elliott*, 937 F.2d at 342), and thus has a proper appeal, or merely "ma[d]e * * * a stab at presenting a legal issue" (*ibid.*), and therefore does not. Since qualified immunity is a highly fact-specific inquiry (see *Anderson*, 483 U.S. at 641), and there is usually some dispute (whether material or not) about the facts, the parties and the court often will have to devote considerable effort to determining whether the defendant is really making an argument that he did not commit the acts alleged by the plaintiff. While this Court "has expressly rejected efforts to reduce the finality requirement of [28 U.S.C.] § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal" (*Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 439 (1985)), such a determination will be required for qualified immunity appeals after this decision.

In short, there is no basis in caselaw, logic, or public policy for the Seventh Circuit's holding. The issue is a recurring and important one. Further review therefore is in order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK F. SMOLENS
Flynn, Murphy, Ryan & Seyring
Suite 3232
30 North LaSalle Street
Chicago, Illinois 60602
(312) 372-3800

CHARLES A. ROTHFELD*
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202 778-0616

**Counsel of Record*

SEPTEMBER 1994

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3777
Houston Jones,

Plaintiff-Appellee,

v.

Tyson Johnson, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 91 C 7095-**Joan B. Gottschall**, Magistrate Judge.

Argued May 10, 1994-Decided June 14, 1994

Before Eschbach, Easterbrook, and Kanne, Circuit Judges.

Per Curiam. Defendants have filed an interlocutory appeal to assert the defense of official immunity.

Although *Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985), permits immunity appeals under the collateral order doctrine, we held in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), that defendants may urge only legal issues on such appeals. Accord, *Crawford-El v. Britton*, 951 F.2d 1314, 1317 (D.C. Cir. 1991); see also *Meyer v. Robinson*, 992 F.2d 734, 737-38 (7th Cir. 1993). A cry of "we didn't do it" does not present any distinctly legal issue

or seek protection from legal uncertainty, the genesis of doctrines of official immunity. To see that appellants are contending that they did not commit the acts of which plaintiff accuses them, one need not get beyond the first argument heading in their brief:

> WHERE NOT A SCINTILLA OF EVIDENCE EXISTS THAT ONE OR MORE OF THE DEFENDANTS, JOHNSON, DEEVEY OR PAYNE, EVER STRUCK, PUNCHED OR KICKED THE PLAINTIFF, OR EVER OBSERVED ANYONE DOING SO--EITHER IN THE PARKING LOT OR IN THE POLICE STATION--SAID DEFENDANTS ARE ENTITLED TO A SUMMARY JUDGMENT ON THE PLAINTIFF'S "EXCESSIVE FORCE" CLAIMS

Defendants do not deny that if they beat the plaintiff, as he believes they did, then they lack immunity. Whether they beat the plaintiff is a question that must be resolved in the district court before it may be reviewed on appeal. When asked at oral argument if they could lose the factual dispute and still prevail, defendants' lawyer answered no. In consequence, we lack appellate jurisdiction over the contention that the defendants did not commit or abet battery.

The excessive force claim must be distinguished from the plaintiff's argument that the defendants lacked probable cause to arrest him. It is undisputed that an officer found plaintiff, apparently intoxicated, hitting his head against a building, and took him into custody. These facts imply disorderly conduct, which supports an arrest. Plaintiff contends that he was not drunk but was suffering from an insulin reaction, and that the police should have figured this out. The magistrate judge, presiding by consent under 28 U.S.C. §636(c), concluded that plaintiff had not adduced sufficient evidence to dispute the officers' version of the arrest--which, if accepted, entitles them to immunity if not to prevail outright. *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991); *Mahoney v. Kesery*, 976 F.2d 1054, 1057-59 (7th Cir. 1992). But the judge concluded that because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim also should be tried.

This approach is mistaken. Summary judgement is not a discretionary remedy. If the plaintiff lacks enough evidence, summary

judgment must be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Immunity claims should be resolved as early in the case as possible-- and by the court rather than the jury. *Elder v. Holloway*, 114 S. Ct. 1019, 1023 (1994); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Elliott*, 937 F.2d at 344-45. On the facts that this record presents, taken in the light most favorable to plaintiff, an arrest did not "violate clearly established . . .rights of which a reasonable person would have known". *Harlow*, 457 U.S. at 818. The three appellants therefore are entitled to qualified immunity on the false arrest claim.

The judgment on the false arrest claim is reversed, and the appeal is dismissed to the extent appellants seek review of the excessive force claim.

A true Copy:
Teste:

_____
Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HOUSTON JONES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 91 C 7095
	)	
VILLAGE OF VILLA PARK,	)	
a municipal corporation,	)	
JOHN HEIDELMEIER,	)	
TYSON JOHNSON,	)	
G. ESPOSITO,	)	
ROBERT DEEVEY, JOHN PAYNE,	)	
and STUART LUCADO,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the court on defendants' motion for summary judgment. For the reasons set forth below, the motion is denied.

Background

The five individual defendants in this action under 42 U.S.C. §1983 are John Heidelmeier ("Heidelmeier"), Tyson Johnson ("Johnson"), G. Esposito ("Esposito"), Robert Deevey ("Deevey") and John Payne ("Payne"). All were police officers of the Village of Villa Park, Illinois ("Village") at the time of the events giving rise to this dispute. Village is named as a defendant only in plaintiff's pendent claims under state law. Since the commencement of this lawsuit, foul counts of plaintiff's ten-count complaint have been dismissed, including a claim against Village under §1983. Defendants now seek judgment in their favor on the

remaining counts of the complaint. The claims in question are the alleged violations of Fourth Amendment rights in Count I, and state law claims of false arrest, false imprisonment, malicious prosecution, assault and battery. Since those claims are apparently subsumed into the claim of "willful and wanton misco nduct" in Count V, that claim would not survive the dismissal of the other counts.

Facts relevant to this motion are few. It is undisputed that on November 6, 1990, Heidelmeier responded to a report of an apparently intoxicated man in or near an intersection in Village. Upon his arrival, Heidelmeier found plaintiff hitting his head or forehead against the door of a building. Heidelmeier then approached plaintiff in an attempt to ascertain whether there was a problem. From this point, the parties' versions of the facts diverge.

Heidelmeier states that when he asked plaintiff what was happening, plaintiff placed his hands in his pockets and began to fidget with something that later turned out to be a pocketknife in a scabbard. When Heidelmeier attempted a pat-down search, plaintiff struck him in the arms with a clenched fist. At that point, Heidelmeier decided to place plaintiff under arrest and he forced plaintiff to the ground in order to handcuff him behind his back. Heidelmeier could not accomplish this task alone because of plaintiff's struggling. In the interim, the other individual defendants had arrived on the scene and they assisted Heidelmeier in handcuffing plaintiff and placing him in a squad car. Defendants state that due to plaintiff's extreme resistance to their attempts to place him under arrest, it took the efforts of all five officers to control him.

Defendants contend that no one struck, beat or abused plaintiff while in the parking lot where he was arrested. Defendants Johnson, Payne and Deevey add that at that point their involvement in the arrest ended and that they saw no one abuse plaintiff at the police station either. PX D-F. Shortly after plaintiff arrived at the police station, paramedics were called. Plaintiff spent several days in the hospital for treatment of multiple trauma and several broken ribs. DX A at 76; PXF.

Plaintiff contends that he was experiencing an insulin reaction at the time of his arrest. His physician has testified that as a consequence, plaintiff's recollection of relevant events would be very poor and he would probably have been greatly weakened. However, in a small percentage of cases, a person undergoing an insulin reaction may show greater than normal strength. According to his doctor, during an insulin reaction, plaintiff could be coherent for brief periods of time and he could engage in conversation and control motor functions. The motor deficit would resemble that caused by intoxication. DX B at 5-21. Consistent with that testimony, plaintiff disclaims recollection of specific actions taken by defendants. However, he claims that he can recall experiencing extreme pain at various points, as when his arm was placed in an armlock and he was forced to the ground. Plaintiff denies having resisted the officers' efforts as they say he did, and he contends that the beating and verbal abuse continued after his arrival at Village's police station. Plaintiff's expert witness would testify that defendants used excessive force in the arrest and otherwise responded inappropriately to the little risk that plaintiff posed.

Plaintiff was charged with criminal offenses of disorderly conduct, battery and resisting arrest. At the time of his trial in the state court, plaintiff asserted the defense that he lacked the requisite mental state for the offenses charged. Plaintiff also testified that he had no recollection of what transpired from the time he first felt the insulin reaction until he noticed he was being dragged up the stairs of Village's police station. In the interim, he only remembered feeling a lot of pain. DX A at 69-70, 78. However, plaintiff recalled seeing Heidelmeier and Esposito while being beaten at the police station. DX A at 73-74, 83. Having heard each side's version of the events, and the medical testimony concerning the effects of an insulin reaction, the trial court found that plaintiff came into contact, struck, and resisted a peace officer. Although the judge found defendants' testimony credible and felt that all other elements of the charges against plaintiff had been proven, he concluded that the State had not proven beyond a reasonable doubt that plaintiff acted knowingly. The basis of the finding as to mental state was the testimony concerning plaintiff's diabetes and insulin shock. DX B at 30-33.

Claims of Excessive Force, Assault and Battery

The present motion for summary judgment asks the court to take into account plaintiff's inability to recall events that transpired prior to his arrival at the police station. Since plaintiff cannot recall specific details, only the individual defendants can provide eyewitness testimony concerning the circumstances of his arrest. All defendants having testified that no one beat or abused plaintiff, they ask the court to dismiss the claims of Johnson, Deevey and Payne. These three officers attest that they played no role in processing plaintiff after his arrest and plaintiff specifically recalls only Heidelmeier and Esposito. Plaintiff challenges the veracity of the three officers' affidavit testimony and observes that even if an officer did not actually participate in a beating, a jury may consider an excessive force claim against him if the officer stood by and allowed others to beat the plaintiff. *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972); *Wilson v. City of Chicago*, 707 F. Supp. 379, 385 (N.D. Ill. 1989).

Regarding the claims against Heidelmeier and Esposito, defendants posit that the only competent testimony concerning the circumstances of the arrest is their own. Defendants argue that the court should not credit plaintiff's testimony, as his own doctor testified that he would not rely on anything plaintiff told him about the incident. Defendants further suggest that plaintiff should be estopped from taking a position in this litigation that is inconsistent with his defense to the criminal charges in the state court, but this court disagrees that such inconsistency exists. As already noted, plaintiff testified in the state court to feelings of great pain during the arrest and to some specific recollections of mistreatment at the police station. While present ability to recall in greater detail may diminish his credibility, there is no obvious contradiction of his former testimony such that his testimony cannot be considered here.

Summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."' Fed.R.Civ.P. 56(c). In examining the record, all reasonable inferences from it are drawn in the light most favorable to the nonmovant. *Maxwell v. City of Indianapolis*,

998 F.2d 431, 433 (7th Cir. 1993). Plaintiff has the burden, however, of establishing a genuine issue for trial.

Applying these principles here, defendants are denied summary judgment on the claims of excessive force, assault and battery. Plaintiff lacks eyewitness testimony supporting his theory of the events surrounding his arrest, but there is sufficient circumstantial evidence supporting his theory of the case. While the culpability of particular defendants may vary, on the present record, it cannot be determined whether the claims against them should be dismissed.

Claims of Unlawful Arrest, False

Imprisonment and Malicious Prosecution

In moving for summary judgment on these claims, defendants rely on several propositions of law, all of which in themselves are correct. First, if defendants establish probable cause for plaintiff's arrest, his claims under §1983 of false arrest, false imprisonment and malicious prosecution necessarily fail. *Biddle v. Martin*, 992 F.2d 673, 678 (7th Cir. 1993); *Mark v. Furay*, 769 F.2d 1266, 1268-1269 (7th Cir. 1985). The existence of probable cause is also a defense to state law claims of false arrest, false imprisonment and malicious prosecution. *Myatt v. City of Chicago*, 816 F. Supp. 1259, 1267 (N.D. Ill. 1992) (citing *Mosley v. La Mastus*, 741 F. Supp. 724 (N.D. Ill. 1990)); *Jones v. Village of Villa Park*, 815 F. Supp. 249, 252-253 (N.D. Ill. 1993). Probable cause existed if at the moment of the arrest, the facts and circumstances within defendants' knowledge were sufficient to warrant a prudent man in believing that a crime was being or had been committed. *See Hunter v. Bryant*, ___ U.S. ___, 112 S.Ct. 534, 537 (1991).

Besides challenging plaintiff's showing of probable cause, defendants raise qualified immunity as a defense. Qualified immunity shields law enforcement officers from damages if they "'reasonably but mistakenly conclude that probable cause is present.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). If a case involves questions as to whether probable cause existed to support officers' actions, the case should not be permitted to go to trial if there is *any* reasonable basis to conclude that

probable cause existed. *Biddle*, 992 F.2d at 676.[1] On the other hand, claims of qualified immunity are not susceptible to resolution on summary judgment if there is substantial overlap between the issue of immunity and the principal issue on the merits. *Maxwell v. City of Indianapolis*, 998 F.2d 431, 435-436 (7th Cir. 1993). *See also Meyer v. Robinson*, 992 F.2d 734, 737 (7th Cir. 1993). Thus, in a false arrest case, an officer might be denied summary judgment on a qualified immunity defense if the evidence raises questions as to whether a reasonable police officer would have found probable cause for an arrest. *See Maxwell*, 998 F.2d at 436; *Mahoney v. Kesery*, 976 F.2d 1054, 1058 (7th Cir. 1992). This result may obtain even if all officers involved in the arrest subjectively believe the arrestee is committing or has committed a crime. *Id.*

The establishment of probable cause for a disorderly conduct arrest requires only a reasonable belief that the arrestee's conduct threatened a breach of the peace. *See id.* at 677-678. While defendants maintain that the test is easily met here, again that contention rests on their own testimony. Plaintiff has not been able to summon eyewitness testimony to the contrary, but he has a sufficient explanation for his inability to do so. Plaintiff has also presented evidence that, at the time of his arrest, he may have been weakened by the insulin reaction and unable to summon the level of resistance that defendants claim he did. If obviously weakened, it is conceivable that no reasonable officer might have found cause for arrest. Plaintiff's inability to recall is potentially more detrimental to his claims of lack of cause to arrest than it is to his claims of excessive force, since the fact of his injuries supports an inference of excessive force used. As determined above, the excessive force claims must be tried. Since there is substantial overlap between the claims of excessive force and lack of probable

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[1] Qualified immunity may also apply in cases of excessive force claims under §1983. *See Rice v. Burks*, 999 F.2d 1172 (7th Cir. 1993). In such cases, a plaintiff may not base his claim on mere speculation that force was excessive. *Id.* at 1175. However, the plaintiff may avoid the application' of qualified immunity if he can show that the force used was so excessive that officers should have been on notice that they were violating the Fourth Amendment. *Id.* at 1174.

cause, and because there is at least some possibility plaintiff could prove lack of probable cause, the court will deny summary judgment on the question of probable cause to arrest.

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is denied.

ENTER:

JOAN B. GOTTSCHALL
United States Magistrate Judge

DATED: October 26, 1993

SUPREME COURT, U.S.
NOV 25 1994
OFFICE OF THE CLERK

No. 94-455

In The

Supreme Court of the United States

October Term, 1994

TYSON JOHNSON, ROBERT DEEVEY, AND JOHN PAYNE,

Petitioners,

v.

HOUSTON JONES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

EDWARD G. PROCTOR, JR.
SANDMAN, LEVY AND PETRICH
134 North LaSalle Street
Suite 1323
Chicago, Illinois 60602
(312) 726-1692

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether there is a conflict in the Circuit Court of Appeals with respect to the extent to which an Appeals Court should review purely factual determinations in the course of a "qualified immunity" interlocutory appeal.

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STATEMENT OF THE CASE

This case stems from an incident which occurred on November 6, 1990 where certain police officers of the Village of Villa Park arrested the Respondent, HOUSTON JONES, in a parking lot for disorderly conduct, battery on a police officer and resisting arrest. HOUSTON JONES has maintained that the police officers brutalized him both at the scene of the arrest and while he was handcuffed in the police station. The only fact which is not in dispute is that Mr. Jones was hitting his forehead on an aluminum door at a muffler shop where the arrest took place and was doing so when Officer Heidlemeyer first approached him. Mr. Jones appeared intoxicated but it was learned he was experiencing hypoglycemia, or more commonly, insulin reaction. HOUSTON JONES affirmatively identified Officers Heidlemeyer and Esposito as being two police officers who repeatedly beat him at the police station. There is also evidence that Officers JOHNSON, DEEVEY and PAYNE were present at the scene of the arrest and at the police station when the beatings took place.[1]

JONES brought a several count Complaint against all of the police officers and the Village of Villa Park. A series of counts brought against the officers and the Village related to the use of excessive force and were

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[1] During the course of discovery, it was learned that Officer Stuart Lucatto was not at the scene of the arrest and was waiting outside in a squad car to drive Jones to the hospital for his injuries and did not witness any beatings at the scene of the arrest or in the police station and therefore, was voluntarily dismissed on Plaintiff's Motion.

brought under 42 U.S.C. §1983 and various State Court claims. The other grouping of counts brought against these Defendants involved the "probable cause" type of claims. Defendants moved for summary judgment on the excessive force claims and on the claims involving "probable cause". The Defendant asserted that with respect to the probable cause type of claims or more particularly, the false arrest, false imprisonment and malicious prosecution claims, that the undisputed facts showed that there was probable cause for the arrest of the Plaintiff at the situs of the muffler shop. With respect to the excessive force and battery type claims, the Defendants, JOHNSON, DEEVEY and PAYNE, asserted that there was not a scintilla of evidence that they struck the Plaintiff or were present during any of the beatings. The other two Defendants, HEIDLEMEYER and JOHNSON, with respect to the excessive force and battery type claims, asserted that the Plaintiff had no recollection of the events and therefore, they should escape liability for any alleged brutality.

The Trial Court found ample evidence in the record to provide a question of fact as to the Plaintiff's version of the events versus the Defendants and therefore, denied Defendant's Motion for Summary Judgment in all respects. App., *infra*, 4a-10a. Defendant, Petitioners TYSON JOHNSON, ROBERT DEEVEY and JOHN PAYNE, appealed this decision in the United States Court

of Appeals for the Seventh Circuit.[2] The Petitioners' interlocutory appeal was two part: (1) With respect to the excessive force and battery type claims, they asserted that there was not a scintilla of evidence that exists that any of the Petitioners punched or struck the Plaintiff or observed any other police officer doing so and; (2) With respect to the "probable cause" type claims for false arrest, false imprisonment and malicious prosecution, the Petitioners asserted that there was probable cause for the arrest and therefore, these claims must fail. The Circuit Court of Appeals dismissed the false arrest, false imprisonment and malicious prosecution claims because it was not disputed that the Plaintiff did appear intoxicated and was hitting his head on a garage door. This, the Court found, was enough to constitute probable cause. App., *infra*, 1a-3a.

However, with respect to the excessive force and battery type claims, the District Court held that it lacked jurisdiction because the law is clearly established at the time of this incident that standby police officers are liable for beatings that are in their presence or that they knew about at the time the abuse was occurring.[3] The Circuit Court of Appeals stated that it lacked jurisdiction with respect to reviewing these claims because the question of these Respondents' involvement in the beatings was purely a factual dispute or an "I didn't do it" defense. App., *infra*, 1a-3a. Therefore, with respect to the excessive

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[2] Defendants, Genero Esposito and John Heidlemeyer did not appeal the ruling of the District Court and were not part of that appeal and are not part of this appeal.

[3] *Byrd v. Brischke*, 466 Fed.2d 6 (7th Cir. 1972).

force type claims, the appeal was dismissed. App., *infra*, 2a, 3a.

Petitioners have taken the position that a Circuit Court of Appeals should review all interlocutory appeals where a qualified immunity defense is asserted even if the only issue on appeal is purely a factual one. In support of their position, Petitioners have cited decisions of Appellate Courts in several of the Circuits that have reviewed an interlocutory appeal when there is only a question of fact to resolve. Petitioners argue that those Circuits are in conflict with the Seventh Circuit and other Circuits which will review a District Court's decision only when there is a question of law to be decided or where there is legal uncertainty.

Upon a review of the decisional law in the various Circuits, Respondent agrees that there is a conflict with respect to whether a Circuit Court of Appeals should review an interlocutory appeal taken from a denial of a Motion of Summary Judgment where a qualified immunity defense is asserted and where the only issue on appeal is purely a factual question. These matters fall in two categories: (1) One category is where the facts are disputed and the Defendants simply seek appellate jurisdiction premised on the argument that, "I wasn't there", or "I didn't do it" and; (2) Where the appellant has asserted appellate jurisdiction based on the peculiarly fact bound legal issue of whether there was enough evidence in the record to create a question of fact to warrant a denial of a Motion for Summary Judgment or the "evidence sufficiency" appeal.

ARGUMENT

THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A UNITED STATES COURT OF APPEALS SHOULD REVIEW INTERLOCUTORY APPEALS THAT RAISE ONLY THE QUESTION OF WHETHER A DISTRICT COURT CORRECTLY DECIDED TO SEND A FACTUAL ISSUE TO A JURY

In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), this Court held that a District Court's denial of a claim of qualified immunity is an appealable "final decision" under 28 U.S.C.A. §1291 to the extent that it turns on an issue of law, notwithstanding the absence of a final judgment. *Mitchell*, 472 U.S. at 530, 105 S.Ct. at 2817. The concept of "qualified immunity" for certain officials stems from *Harlow v. Fitzgerlad*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), which recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the essentially legal question whether the conduct of which the Plaintiff complains violated clearly established law. *Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2816. This Court determined that a denial of qualified immunity is immediately appealable because it conclusively determines the right not to stand trial and because it involves a legal issue "conceptionally distinct" from the merits of the Plaintiff's claim. The issue immediately appealable is the purely legal one of whether the facts alleged support a claim of violation of clearly established law. *Mitchell*, 472 U.S. at 528 n.9, 105 S.Ct. at 2816 n.9. Therefore, in order for an interlocutory appeal to be properly before a Circuit Court of Appeal, the appellant must show that the law they are accused of violating was not clearly established or that there was some confusion or uncertainty in the law. The Appellate

Court need not even consider the correctness of the Plaintiff's version of the facts, nor determine whether the Plaintiff's allegations actually state a claim. All it need determine is a question of law. *Mitchell*, 472 U.S. at 528, 105 S.Ct. at 2816.

The Supreme Court considered the qualified immunity appeal again in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), and it was recognized that facts play a role in *Mitchell* appeals. The reason a Court of Appeals examines the facts is to determine whether the law allegedly violated was clearly established at the time that such deeds were forbidden. *Anderson*, 483 U.S. at 641, 107 S.Ct. at 3039. Since these cases have been decided, there have been many decisions in the various Circuits addressing this issue. The issue typically arises in one of two ways: (1) The Defendant loses the Motion for Summary Judgment where the facts are disputed as to whether the Defendant did the violation complained of or whether the Defendant was present during the violation; and (2) the facts are not necessarily in dispute between the parties but the Defendant asks the Circuit Court of Appeals to review whether there was sufficient evidence of a violation for the District Court to be warranted in denying their Motion for Summary Judgment.

1. THE DISPUTED FACTS "I DIDN'T DO IT" OR "I WASN'T THERE", DEFENSE CASES

The overwhelming majority of Circuit Court of Appeals that have directly addressed the question as to

whether or not there is appellate jurisdiction for an interlocutory appeal where there is nothing more presented to the Court of Appeals than a factual dispute, have held that *Mitchell* does not authorize an appeal under such circumstances. *Kaminsky v. Rosenblum,* 929 F.2d 922 (2d Cir. 1991) (Factual finding was essential to resolving the issue of qualified immunity and the District Court's denial of appellant's Summary Judgment Motion was not based on misapprehension or misapplication of law. Inasmuch as there were unresolved disputed questions of fact outstanding, the District Court's order was not final and the Appellate Court lacked jurisdiction over the order appealed from and therefore the Appeal was dismissed.); *Ryan v. Burlington County,* 860 F.2d 1199 (3rd Cir. 1988) (Appellate Court would not examine disputes over facts that concern liability because those are not material to the review of the denial of the Motion for Summary Judgment based on claimed qualified immunity); see also: *Lion Boulos v. Wilson,* 834 F.2d 504 (5th Cir. 1987); *Velasquez v. Senko,* 813 F.2d 1509 (9th Cir. 1987); *Elliott v. Thomas,* 937 F.2d 338 (1991). If a Defendant presented an appeal to the Appellate Court in any of these Circuits requesting review of a denial of a Motion to Dismiss, the appeal would be dismissed *if* the only issue put forth was whether the District Court correctly decided a disputed issue of fact as to whether the Defendant violated a clearly established law at the time of the alleged violation.

The First Circuit does not follow or is not in harmony with the Second, Third, Fifth, Seventh and Ninth Circuits concerning this as the First Circuit has reviewed an

interlocutory appeal where the law was clearly established but the Defendants appealed on the basis that the District Court improperly ruled on questions of fact. *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988). In his dissent, Judge Breyer disagreed with the Court as to the extent to which it should have reviewed purely factual determinations in the course of a qualified immunity interlocutory appeal. It seems that Judge Breyer would follow the position of the Second, Third, Fifth, Seventh and Ninth Circuits concerning this issue in not allowing appellate jurisdiction where there are factual disputes between the parties concerning what happened and who was present during the violation. Therefore, since there seems to be a division among the Circuits and disagreement among judges sitting in the same Circuit as to whether appellate jurisdiction for an interlocutory appeals lies where the only issue involves a factual dispute, this Court should clarify whether a Defendant who loses a Motion for Summary Judgment can gain an immediate interlocutory appeal on the basis that the District Court improperly decided a question of fact. This Court should answer whether a Defendant can obtain review of a District Court's ruling when the only issue that the Defendant raises before the Court is a factual dispute that "he didn't do it" or, "he wasn't there". There must be some uniformity established among the Circuits with respect to this issue.

2. THE INSUFFICIENT EVIDENCE APPEALS

All of the cases cited in Petitioner's Brief deal with this issue, with the exception of *Unwin*. All of the decisions cited in the Petitioner's Brief presented a situation

where a particular Circuit Court of Appeals reviewed a District Court's denial of a Motion for Summary Judgment to determine whether the evidence was sufficient to warrant such a denial. The decisions cited by the Petitioners in their Brief are from the First, Fourth, Eighth and Tenth Circuits and District of Columbia. *See: Wright v. South Arkansas Regional Health Center, Inc.*, 800 F.2d 199 (8th Cir. 1986); *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87 (1st Cir. 1994); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Turner v. Dammon*, 848 F.2d 440 (4th Cir. 1988). These Circuits, *unlike* the Second, Third, Fifth, Seventh and Ninth Circuits, have reviewed appeals involving nothing but a factual issue. The difference between this category of appeals and the "I didn't do it" or "I wasn't there" appeals is that the facts are not necessarily in dispute between the parties. The Defendants assert that, based on the record before the District Judge, the evidence was not sufficient to warrant a denial of their Motion for Summary Judgment. The Petitioners in the case at bar brought an "I didn't do it" or "I wasn't there" defense under the guise of an "evidence sufficiency" appeal when they stated in their Brief that there was not a scintilla of evidence that the Defendants did the acts complained of or that they were present at the time HOUSTON JONES was beaten. App., *infra* 2a. The Court should decide if this type of an issue is appropriately decided in an interlocutory appeal. Perhaps Judge Breyer, in his dissenting opinion in *Unwin v. Campbell* was correct in suggesting that the Supreme Court in *Mitchell* has not answered the question as to whether a Circuit Court of Appeals has jurisdiction over an interlocutory appeal when the only question is whether the

evidence was sufficient to warrant a District Court's denial of a Motion for Summary Judgment.

There is no question that if it can be shown that there is uncertainty in the law or that the applicable law controlling in a particular situation is not clearly established, then a Circuit Court of Appeals certainly has jurisdiction to clarify what the law is and review whatever pertinent facts in determining what law was allegedly violated. The question which is not clear is whether there should be Appellate jurisdiction to review a District Court's ruling on the basis that there was not sufficient evidence in the record to warrant the District Court's Decision. This is not necessarily a situation where there are two completely different versions of the parties concerning what events took place during the alleged violation and who was present. The decisions cited by the Petitioners from the First, Fourth, Eighth and Tenth Circuits seem to hold that a Court of Appeals should be allowed to review a factual record and determine an exclusively factual issue in deciding whether or not there is evidence sufficient for a District Court's finding that the Defendants did the acts complained of or were present at the time of the alleged violation. *See: Wright v. South Arkansas Regional Health Center, Inc.*, 800 F.2d 199 (8th Cir. 1986); *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87 (1st Cir. 1994); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Turner v. Dammon*, 848 F.2d 440 (4th Cir. 1988). This approach is in conflict with the Second, Third, Fifth, Seventh and Ninth Circuits that do not accept review of an exclusively factual dispute under any circumstances.

CONCLUSION

There have been many arguments contained in the opinions as to whether a Circuit Court of Appeals should or should not review matters which put forth only factual determinations and these arguments and issues should be explored further by this Court.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD G. PROCTOR, JR.
SANDMAN, LEVY AND PETRICH
134 North LaSalle Street
Suite 1323
Chicago, Illinois 60602
(312) 726-1692

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3777
Houston Jones,

Plaintiff-Appellee,

v.

Tyson Johnson, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 91 C 7095-**Joan B. Gottschall,** Magistrate Judge.

Argued May 10, 1994 – Decided June 14, 1994

Before Eschbach, Easterbrook, and Kanne, Circuit Judges.

Per Curiam. Defendants have filed an interlocutory appeal to assert the defense of official immunity.

Although *Mitchell v. Forsyth,* 472 U.S. 511, 524-29 (1985), permits immunity appeals under the collateral order doctrine, we held in *Elliott v. Thomas,* 937 F.2d 338 (7th Cir. 1991), that defendants may urge only legal issues on such appeals. Accord, *Crawford-El v. Britton,* 951 F.2d 1314, 1317 (D.C. Cir. 1991); see also *Meyer v. Robinson,* 992 F.2d 734, 737-38 (7th Cir. 1993). A cry of "we didn't do it" does not present any distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of

official immunity. To see that appellants are contending that they did not commit the acts of which plaintiff accuses them, one need not get beyond the first argument heading in their brief:

> WHERE NOT A SCINTILLA OF EVIDENCE EXISTS THAT ONE OR MORE OF THE DEFENDANTS, JOHNSON, DEEVEY OR PAYNE, EVER STRUCK, PUNCHED OR KICKED THE PLAINTIFF, OR EVER OBSERVED ANYONE DOING SO – EITHER IN THE PARKING LOT OR IN THE POLICE STATION – SAID DEFENDANTS ARE ENTITLED TO A SUMMARY JUDGMENT ON THE PLAINTIFF'S "EXCESSIVE FORCE" CLAIMS

Defendants do not deny that if they beat the plaintiff, as he believes they did, then they lack immunity. Whether they beat the plaintiff is a question that must be resolved in the district court before it may be reviewed on appeal. When asked at oral argument if they could lose the factual dispute and still prevail, defendants' lawyer answered no. In consequence, we lack appellate jurisdiction over the contention that the defendants did not commit or abet battery.

The excessive force claim must be distinguished from the plaintiff's argument that the defendants lacked probable cause to arrest him. It is undisputed that an officer found plaintiff, apparently intoxicated, hitting his head against a building, and took him into custody. These facts imply disorderly conduct, which supports an arrest. Plaintiff contends that he was not drunk but was suffering from an insulin reaction, and that the police should have figured this out. The magistrate judge, presiding by

consent under 28 U.S.C. §636(c), concluded that plaintiff had not adduced sufficient evidence to dispute the officers' version of the arrest – which, if accepted, entitles them to immunity if not to prevail outright. *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991); *Mahoney v. Kesery*, 976 F.2d 1054, 1057-59 (7th Cir. 1992). But the judge concluded that because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim also should be tried.

This approach is mistaken. Summary judgement is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Immunity claims should be resolved as early in the case as possible -- and by the court rather than the jury. *Elder v. Holloway*, 114 S. Ct. 1019, 1023 (1994); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Elliott*, 937 F.2d at 344-45. On the facts that this record presents, taken in the light most favorable to plaintiff, an arrest did not "violate clearly established . . . rights of which a reasonable person would have known". *Harlow*, 457 U.S. at 818. The three appellants therefore are entitled to qualified immunity on the false arrest claim.

The judgment on the false arrest claim is reversed, and the appeal is dismissed to the extent appellants seek review of the excessive force claim.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HOUSTON JONES, Plaintiff, v. VILLAGE OF VILLA PARK, a municipal corporation, JOHN HEIDELMEIER, TYSON JOHNSON, G. ESPOSITO, ROBERT DEEVEY, JOHN PAYNE, and STUART LUCADO, Defendants.	)	No. 91 C 7095

MEMORANDUM OPINION AND ORDER

This matter is before the court on defendants' motion for summary judgment. For the reasons set forth below, the motion is denied.

Background

The five individual defendants in this action under 42 U.S.C. §1983 are John Heidelmeier ("Heidelmeier"), Tyson Johnson ("Johnson"), G. Esposito ("Esposito"), Robert Deevey ("Deevey") and John Payne ("Payne"). All were police officers of the Village of Villa Park, Illinois ("Village") at the time of the events giving rise to this dispute. Village is named as a defendant only in plaintiff's pendent claims under state law. Since the commencement of this lawsuit, foul [sic] counts of plaintiff's ten-count complaint have been dismissed, including

a claim against Village under §1983. Defendants now seek judgment in their favor on the remaining counts of the complaint. The claims in question are the alleged violations of Fourth Amendment rights in Count I, and state law claims of false arrest, false imprisonment, malicious prosecution, assault and battery. Since those claims are apparently subsumed into the claim of "willful and wanton misconduct" in Count V, that claim would not survive the dismissal of the other counts.

Facts relevant to this motion are few. It is undisputed that on November 6, 1990, Heidelmeier responded to a report of an apparently intoxicated man in or near an intersection in Village. Upon his arrival, Heidelmeier found plaintiff hitting his head or forehead against the door of a building. Heidelmeier then approached plaintiff in an attempt to ascertain whether there was a problem. From this point, the parties' versions of the facts diverge.

Heidelmeier states that when he asked plaintiff what was happening, plaintiff placed his hands in his pockets and began to fidget with something that later turned out to be a pocketknife in a scabbard. When Heidelmeier attempted a pat-down search, plaintiff struck him in the arms with a clenched fist. At that point, Heidelmeier decided to place plaintiff under arrest and he forced plaintiff to the ground in order to handcuff him behind his back. Heidelmeier could not accomplish this task alone because of plaintiff's struggling. In the interim, the other individual defendants had arrived on the scene and they assisted Heidelmeier in handcuffing plaintiff and placing him in a squad car. Defendants state that due to plaintiff's extreme resistance to their attempts to place

him under arrest, it took the efforts of all five officers to control him.

Defendants contend that no one struck, beat or abused plaintiff while in the parking lot where he was arrested. Defendants Johnson, Payne and Deevey add that at that point their involvement in the arrest ended and that they saw no one abuse plaintiff at the police station either. PX D-F. Shortly after plaintiff arrived at the police station, paramedics were called. Plaintiff spent several days in the hospital for treatment of multiple trauma and several broken ribs. DX A at 76; PXF.

Plaintiff contends that he was experiencing an insulin reaction at the time of his arrest. His physician has testified that as a consequence, plaintiff's recollection of relevant events would be very poor and he would probably have been greatly weakened. However, in a small percentage of cases, a person undergoing an insulin reaction may show greater than normal strength. According to his doctor, during an insulin reaction, plaintiff could be coherent for brief periods of time and he could engage in conversation and control motor functions. The motor deficit would resemble that caused by intoxication. DX B at 5-21. Consistent with that testimony, plaintiff disclaims recollection of specific actions taken by defendants. However, he claims that he can recall experiencing extreme pain at various points, as when his arm was placed in an armlock and he was forced to the ground. Plaintiff denies having resisted the officers' efforts as they say he did, and he contends that the beating and verbal abuse continued after his arrival at Village's police station. Plaintiff's

expert witness would testify that defendants used excessive force in the arrest and otherwise responded inappropriately to the little risk that plaintiff posed.

Plaintiff was charged with criminal offenses of disorderly conduct, battery and resisting arrest. At the time of his trial in the state court, plaintiff asserted the defense that he lacked the requisite mental state for the offenses charged. Plaintiff also testified that he had no recollection of what transpired from the time he first felt the insulin reaction until he noticed he was being dragged up the stairs of Village's police station. In the interim, he only remembered feeling a lot of pain. DX A at 69-70, 78. However, plaintiff recalled seeing Heidelmeier and Esposito while being beaten at the police station. DX A at 73-74, 83. Having heard each side's version of the events, and the medical testimony concerning the effects of an insulin reaction, the trial court found that plaintiff came into contact, struck, and resisted a peace officer. Although the judge found defendants' testimony credible and felt that all other elements of the charges against plaintiff had been proven, he concluded that the State had not proven beyond a reasonable doubt that plaintiff acted knowingly. The basis of the finding as to mental state was the testimony concerning plaintiff's diabetes and insulin shock. DX B at 30-33.

Claims of Excessive Force, Assault and Battery

The present motion for summary judgment asks the court to take into account plaintiff's inability to recall events that transpired prior to his arrival at the police station. Since plaintiff cannot recall specific details, only

the individual defendants can provide eyewitness testimony concerning the circumstances of his arrest. All defendants having testified that no one beat or abused plaintiff, they ask the court to dismiss the claims of Johnson, Deevey and Payne. These three officers attest that they played no role in processing plaintiff after his arrest and plaintiff specifically recalls only Heidelmeier and Esposito. Plaintiff challenges the veracity of the three officers' affidavit testimony and observes that even if an officer did not actually participate in a beating, a jury may consider an excessive force claim against him if the officer stood by and allowed others to beat the plaintiff. *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972); *Wilson v. City of Chicago*, 707 F. Supp. 379, 385 (N.D. Ill. 1989).

Regarding the claims against Heidelmeier and Esposito, defendants posit that the only competent testimony concerning the circumstances of the arrest is their own. Defendants argue that the court should not credit plaintiff's testimony, as his own doctor testified that he would not rely on anything plaintiff told him about the incident. Defendants further suggest that plaintiff should be estopped from taking a position in this litigation that is inconsistent with his defense to the criminal charges in the state court, but this court disagrees that such inconsistency exists. As already noted, plaintiff testified in the state court to feelings of great pain during the arrest and to some specific recollections of mistreatment at the police station. While present ability to recall in greater detail may diminish his credibility, there is no obvious contradiction of his former testimony such that his testimony cannot be considered here.

Summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ' [sic] Fed.R.Civ.P. 56(c). In examining the record, all reasonable inferences from it are drawn in the light most favorable to the nonmovant. *Maxwell v. City of Indianapolis*, 998 F.2d 431, 433 (7th Cir. 1993). Plaintiff has the burden, however, of establishing a genuine issue for trial.

Applying these principles here, defendants are denied summary judgment on the claims of excessive force, assault and battery. Plaintiff lacks eyewitness testimony supporting his theory of the events surrounding his arrest, but there is sufficient circumstantial evidence supporting his theory of the case. While the culpability of particular defendants may vary, on the present record, it cannot be determined whether the claims against them should be dismissed.

Claims of Unlawful Arrest, False Imprisonment and Malicious Prosecution

In moving for summary judgment on these claims, defendants rely on several propositions of law, all of which in themselves are correct. First, if defendants establish probable cause for plaintiff's arrest, his claims under §1983 of false arrest, false imprisonment and malicious prosecution necessarily fail. *Biddle v. Martin*, 992 F.2d 673, 678 (7th Cir. 1993); *Mark v. Furay*, 769 F.2d 1266, 1268-1269 (7th Cir. 1985). The existence of probable cause

is also a defense to state law claims of false arrest, false imprisonment and malicious prosecution. *Myatt v. City of Chicago*, 816 F. Supp. 1259, 1267 (N.D. Ill. 1992) (citing *Mosley v. La Mastus*, 741 F. Supp. 724 (N.D. Ill. 1990)); *Jones v. Village of Villa Park*, 815 F. Supp. 249, 252-253 (N.D. Ill. 1993). Probable cause existed if at the moment of the arrest, the facts and circumstances within defendants' knowledge were sufficient to warrant a prudent man in believing that a crime was being or had been committed. *See Hunter v. Bryant*, ___ U.S. ___, 112 S.Ct. 534, 537 (1991).

Besides challenging plaintiff's showing of probable cause, defendants raise qualified immunity as a defense. Qualified immunity shields law enforcement officers from damages if they " 'reasonably but mistakenly conclude that probable cause is present.' " *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). If a case involves questions as to whether probable cause existed to support officers' actions, the case should not be permitted to go to trial if there is *any* reasonable basis to conclude that probable cause existed. *Biddle*, 992 F.2d at 676.[1] On the other hand, claims of qualified immunity are not susceptible to resolution on summary judgment if

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[1] Qualified immunity may also apply in cases of excessive force claims under §1983. *See Rice v. Burks*, 999 F.2d 1172 (7th Cir. 1993). In such cases, a plaintiff may not base his claim on mere speculation that force was excessive. *Id.* at 1175. However, the plaintiff may avoid the application of qualified immunity if he can show that the force used was so excessive that officers should have been on notice that they were violating the fourth amendment. *Id.* at 1174.

there is substantial overlap between the issue of immunity and the principal issue on the merits. *Maxwell v. City of Indianapolis*, 998 F.2d 431, 435-436 (7th Cir. 1993). *See also Meyer v. Robinson*, 992 F.2d 734, 737 (7th Cir. 1993). Thus, in a false arrest case, an officer might be denied summary judgment on a qualified immunity defense if the evidence raises questions as to whether a reasonable police officer would have found probable cause for an arrest. *See Maxwell*, 998 F.2d at 436; *Mahoney v. Kesery*, 976 F.2d 1054, 1058 (7th Cir. 1992). This result may obtain even if all officers involved in the arrest subjectively believe the arrestee is committing or has committed a crime. *Id.*

The establishment of probable cause for a disorderly conduct arrest requires only a reasonable belief that the arrestee's conduct threatened a breach of the peace. *See id.* at 677-678. While defendants maintain that the test is easily met here, again that contention rests on their own testimony. Plaintiff has not been able to summon eyewitness testimony to the contrary, but he has a sufficient explanation for his inability to do so. Plaintiff has also presented evidence that, at the time of his arrest, he may have been weakened by the insulin reaction and unable to summon the level of resistance that defendants claim he did. If obviously weakened, it is conceivable that no reasonable officer might have found cause for arrest. Plaintiff's inability to recall is potentially more detrimental to his claims of lack of cause to arrest than it is to his claims of excessive force, since the fact of his injuries supports an inference of excessive force used. As determined above, the excessive force claims must be tried. Since there is substantial overlap between the claims of

excessive force and lack of probable cause, and because there is at least some possibility plaintiff could prove lack of probable cause, the court will deny summary judgment on the question of probable cause to arrest.

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is denied.

ENTER:

JOAN B. GOTTSCHALL
United States Magistrate Judge

DATED: October 26, 1993

Supreme Court, U.S.
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No. 94-455

In the Supreme Court of the United States

OCTOBER TERM, 1994

TYSON JOHNSON, ROBERT DEEVEY, AND JOHN PAYNE, *Petitioners,*

v.

HOUSTON JONES, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

MARK F. SMOLENS
Flynn, Murphy, Ryan & Seyring
Suite 3232
Chicago, Illinois 60602
(312) 372-3800

CHARLES A. ROTHFELD*
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

**Counsel of Record*

6 pp

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---

PETITIONER'S REPLY BRIEF

Respondent's brief responding to the petition for a writ of certiorari in this case forthrightly acknowledges that review by this Court is appropriate because "there is a conflict [in the circuits] with respect to whether a Circuit Court of Appeals should review an interlocutory appeal taken from denial of a Motion of Summary Judgment where a qualified immunity defense is asserted and where the only issue on appeal is a purely factual question." Br. in Opp. 4.

Needless to say, we fully concur in this submission. We nevertheless submit this brief to clarify the nature of the conflict in the courts of appeals and to address recent action by this Court that emphasizes the importance of the issue presented in this case.

1. Respondent suggests that there is some distinction between cases where "(1) The Defendant loses the Motion for Summary Judgment where the facts are disputed as to whether the Defendant did the violation complained of * * *; and (2) the facts are not necessarily in dispute between the parties but the Defendant asks the Circuit Court of Appeals to review whether there was sufficient evidence of a violation for the District Court to be warranted in denying their Motion for Summary Judgment." Br. in Opp. 6. In fact, this dichotomy is not reflected in the cases. Whether or not any of the underlying facts were in dispute, the decisions of the First, Fourth, Eighth, Ninth, Tenth and District of Columbia Circuits that are cited in the petition (at Pet. 6-16) resolved a single question: whether summary judgment was properly denied because, "when all the facts [were] viewed in the light most favorable to plaintiff, there [was] a[] genuine issue [of fact], triable to a jury." *Wright* v. *South Arkansas Regional Health Center, Inc.*, 800 F.2d 199, 203 (8th Cir. 1986). In contrast, as respondent acknowledges, the Seventh Circuit considers itself without jurisdiction to resolve that question.[1]

---

[1] Respondent suggests (Br. in Opp. 7) that the Second, Third, Fifth, and Ninth Circuits are aligned with the Seventh on this issue. In fact, as we explain in the petition (at 12-13), the Ninth Circuit expressly rejected the Seventh Circuit's approach in *Burgess* v. *Pierce County*, 918 F.2d 104, 105-106 (9th Cir. 1990). The earlier decision in *Velasquez* v. *Senko*, 813 F.2d 1509, 1511 n.3 (9th Cir. 1987), relied upon by respondent, had reserved the question "whether denial of a summary judgment motion based on defendants' non-involvement made after discovery is complete would present a properly appealable legal issue"; *Burgess* expressly

This conflict should be resolved by the Court.

2. The importance of settling the rules governing appellate jurisdiction over Section 1983 appeals is suggested by this Court's *sua sponte* order of October 31, 1994, directing the parties in *Swint* v. *Chambers County Commission*, No. 93-1636, to brief the question "[w]hether the Eleventh Circuit, by virtue of its jurisdiction to review the District Court's denial of the individual defendants' motions seeking summary judgment on the basis of qualified immunity, also had jurisdiction to review the District Court's denial of the Chambers County Commission's motion for summary judgment." In *Swint*, the plaintiff sued both the Chambers County Commission and several individual law enforcement officers under Section 1983. Motions for summary judgment filed by the officers and the Commission were denied; the officers then filed interlocutory appeals to advance their qualified immunity claims. Although the Commission is not entitled to assert an immunity defense, the Eleventh Circuit held that the pendency of the officers' immunity appeals gave the court "pendent appellate jurisdiction" over the Commission's interlocutory appeal from the denial of its motion for summary judgment on the merits. See 5 F.3d at 1449 ("'[p]endent jurisdiction is properly exercised over non-appealable decisions of the district court

---

distinguished *Velasquez* on the ground that "discovery had not yet occurred in that case." 918 F.2d at 106 n.3. As we also explain in the petition (at 16 & n.6), the rule in the Second and Third Circuits is unclear. As for the Fifth Circuit, the court in *Boulos* v. *Wilson*, 834 F.2d 504, 509 (5th Cir. 1987), relied on *Velasquez* in dismissing an appeal from an order compelling limited discovery prior to a ruling on a qualified immunity claim; the court accordingly did not reach the question, presented here, whether it would have jurisdiction over an appeal taken after discovery in which the defendant contended that he had not committed the acts complained of by the plaintiff.

when the reviewing court already has jurisdiction over one issue in the case'" (citation omitted)).

We think it clear that this case should not be held pending resolution of the wholly distinct issue presented in *Swint*. There, the question is whether the pendency of a state official's concededly proper interlocutory immunity appeal confers jurisdiction to resolve *another party's* non-immunity appeal; the issue to be briefed by the parties is the general one whether pendent appellate jurisdiction may be exercised. Here, in contrast, the question is the logically precedent one whether a state official has a proper immunity claim in the first place when the plaintiff fails to adduce any evidence showing wrongful conduct, an issue that is not before the Court in *Swint*. That the Court believed it necessary to direct the parties' attention in *Swint* to the issue of jurisdiction, however, seems to confirm what the petition in this case suggests: that clear and uniform rules governing appellate jurisdiction over interlocutory appeals are essential.

3. This case accordingly presents an important and recurring issue on which the courts of appeals are divided. The significance of the question presented here is reflected by the *amicus* brief submitted in support of the petition by the City of Chicago, a frequent litigant in the Seventh Circuit, which notes that the issue settled below often arises in suits involving local, state, and federal officials. Br. 4. As Chicago explains, the holding below will involve public officials in protracted and vexatious litigation, while encouraging time-consuming and wasteful disputes about the existence of jurisdiction. Further review therefore is in order.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK F. SMOLENS
Flynn, Murphy, Ryan & Seyring
Suite 3232
Chicago, Illinois 60602
(312) 372-3800

CHARLES A. ROTHFELD*
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

**Counsel of Record*

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BRIEF OF THE CITY OF CHICAGO AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SUSAN S. SHER
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON *
Chief Assistant Corporation Counsel
30 North LaSalle Street
Suite 800
Chicago, IL 60602
(312) 744-7764
* *Counsel of Record for* Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether, in an action under 42 U.S.C. § 1983, the denial of a public official's motion seeking summary judgment on qualified immunity grounds because the plaintiff failed to adduce any evidence showing wrongful conduct may be challenged in an interlocutory appeal.

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BRIEF OF THE CITY OF CHICAGO AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The City of Chicago is by far the largest city in the Seventh Circuit and has by far the largest municipal work force. The City therefore has more to lose than any other jurisdiction from the Seventh Circuit's unwarranted imposition in this case of a radical limitation on the right to immediate appeal of the district court's rejection of the defense of qualified immunity before a public official is subjected to the burdens of discovery and trial. In fact, the decision below simply follows a ruling in a case involving the City of Chicago in which the Seventh Circuit made up this rule limiting appeals. *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), cert. denied, 112 S. Ct. 1242 (1992). Because the court of appeals' decision in

this case has a direct and substantial effect on the City of Chicago, we submit this brief to urge the Court to grant the petition for a writ of certiorari.

ARGUMENT

This Court has specifically held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). In *Elliott v. Thomas,* 937 F.2d 338 (7th Cir. 1991), cert. denied, 112 S. Ct. 1242 (1992), the Seventh Circuit held that *Mitchell* does not authorize an appeal from a district court's "refusal to grant summary judgment to a defendant who denies committing any wrong." 937 F.2d at 340. The court stated that "[i]t would extend *Mitchell* well beyond its rationale to accept an appeal containing nothing but a factual issue" and asserted that it was joining other courts of appeals that had held that *Mitchell* does not authorize an appeal to argue 'we didn't do it.'" 937 F.2d at 342. According to the court, "the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainty; there is no separate 'right not to be tried' on the question whether the defendants did the deeds alleged; that is *precisely* the question for trial." *Id.* at 341 (emphasis in original). Accordingly, the court dismissed an interlocutory appeal by the City of Chicago for lack of jurisdiction. *Id.* at 343.

This limitation makes no sense. The defense of qualified immunity assists in ensuring that public official defendants need not be distracted from their duties and subject themselves to the rigors of discovery and trial in insubstantial cases. See *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982). Under *Elliott,* a defendant who admits engaging in misconduct, but who argues that, at the time of such misconduct, it had not yet been clearly established

that such misconduct violated the Constitution, obtains the protection of an interlocutory appeal before he must stand trial; however, a defendant who denies engaging in any misconduct, and who argues that the plaintiff has no genuine evidence of misconduct, has no right to an interlocutory appeal. Such a rule is plainly perverse.

It is also wrong. Both *Mitchell* and *Anderson v. Creighton*, 483 U.S. 635 (1987), make clear that a public official asserting qualified immunity "is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed [acts that violate clearly established law]." *Mitchell*, 472 U.S. at 526; see *Anderson*, 483 U.S. at 646 n.6. And *Harlow* makes clear why this is so: qualified immunity protects the official whose actions did not violate clearly established law. 457 U.S. at 818. Nowhere has this Court ever indicated that it matters whether the reason the defendant did not violate clearly established law is that the law was not clearly established at the time that he acted or that he simply did not do the things the plaintiff alleges he did. Indeed, in *Siegert v. Gilley*, 500 U.S. 226 (1991), the Court held that one way a defendant can prevail on qualified immunity grounds in an interlocutory appeal is to show that he is entitled to win on the merits. *Id.* at 232. There is thus no incompatibility between the two kinds of qualified immunity defenses, and certainly no reason to treat them differently for purposes of appellate jurisdiction.

Contrary to the court's claim in *Elliott*, the result below has been expressly rejected in at least five other circuits, as the petition thoroughly explains. See *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir. 1990); *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988); *Turner v. Dammon*, 848 F.2d 440 (4th Cir. 1988); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Wright v. South Arkansas Regional Health Center*, 800 F.2d 199 (8th Cir. 1986). See also *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C.

Cir.), vacated in part and rehearing en banc granted, 817 F.2d 144, original opinion reinstated, 824 F.2d 1240 (1987) (holding that plaintiff's evidence was insufficient to warrant denial of motion for summary judgment on qualified immunity grounds).

Prior to *Elliott*, two other circuits had entertained appeals from what *Elliott* calls a "we didn't do it" qualified immunity defense, but they have been infected by the error of *Elliott* and they, too, now refuse such appeals. Compare *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990), cert. denied, 501 U.S. 1218 (1991), and *Ramirez v. Webb*, 835 F.2d 1153 (6th Cir. 1987) (both entertaining appeals in "we didn't do it" cases), with *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994) (holding that such a defense is not cognizable as a qualified immunity defense), and *Stone v. Holzberger*, 23 F.3d 408 (6th Cir. 1994) (holding that there is no right of interlocutory appeal for such defenses).

The limitation of qualified immunity appeals is also of considerable practical importance. Our police officers are frequently defendants in civil rights cases, and other City officials are also repeatedly sued. So are federal officials and officials from every state and local government in this circuit. Until the Seventh Circuit's decision in *Elliott*, the denial of qualified immunity was, in this circuit as elsewhere, immediately appealable under *Mitchell*, and when a plaintiff had adduced no genuine evidence of misconduct, the public officials could be spared the burdens of trial by taking an interlocutory appeal. Now, in this circuit—and in reliance on that decision, in the Third and Sixth Circuits as well—federal, state, and local officials may not immediately appeal the district court's denial of qualified immunity in cases where they deny committing any illegal acts. The holding in these cases results in protracted litigation and diverting busy public officials from more important tasks. See *Davis v. Scherer*, 468 U.S. 183, 194 (1984); *Harlow*, 457 U.S. at 814. Yet, under these cases, even specious accusations by a plaintiff with every reason to engage in vexatious litigation—say a

prisoner convicted by the police work of the defendants he sues—must go to trial. Such a result is flatly at odds with this Court's injunction to "resolv[e] immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224 (1991) (per curiam).

Worst of all is the pointless waste of resources on the question whether there is appellate jurisdiction under the obscure distinction drawn by *Elliott* and its progeny. In the time that the courts have spent on the task of determining whether to entertain an appeal in a particular case —that is, whether the qualified immunity defense rests on the claim that the defendant "acted in the shadow of legal uncertainty," *Elliott,* 937 F.2d at 342, or rather that he did nothing wrong by any standard—they likely could have reached the merits of the public official's claim, and thus freed him from the burdens of discovery and trial. Indeed, after the Seventh Circuit dismissed our appeal in *Elliott* and this Court denied the petition for certiorari, we went to trial and prevailed.

Review by this Court is amply warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SUSAN S. SHER
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON *
Chief Assistant Corporation
Counsel
30 North LaSalle Street
Suite 800
Chicago, IL 60602
(312) 744-7764
* *Counsel of Record for*
Amicus Curiae

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BRIEF FOR PETITIONERS

MARK F. SMOLENS
Flynn, Murphy, Ryan & Seyring
Suite 3232
30 North LaSalle Street
Chicago, Illinois 60602
(312) 372-3800

CHARLES A. ROTHFELD*
MYLES R. HANSEN
GARY A. ORSEK
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 778-0616

**Counsel of Record*

QUESTION PRESENTED

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-455

TYSON JOHNSON, ROBERT DEEVEY, AND JOHN PAYNE, *Petitioners*

v.

HOUSTON JONES, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 26 F.3d 727. The opinion of the district court (Pet. App. 4a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1994. The petition for a writ of certiorari was filed on September 12, 1994, and was granted on January 6, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

STATEMENT

Petitioners are law enforcement officers who were sued under 42 U.S.C. § 1983 for the allegedly excessive use of force. They sought summary judgment on qualified immunity grounds, asserting that their actions did not violate clearly established law because there was no evidence that their conduct was inconsistent with *any* legal standard. The district court denied the motion. The court of appeals then held that it lacked jurisdiction to entertain petitioners' interlocutory appeal. This holding is logically insupportable, threatens to frustrate the purposes of the qualified immunity doctrine, and cannot be reconciled with the consistent course of this Court's decisions applying the rule of finality. It should be set aside.

1. On November 6, 1990, John Heidelmeier, an officer of the Villa Park, Illinois, police department, responded to a report of an apparently intoxicated man in or near an intersection. When Heidelmeier arrived at the scene he found respondent beating his head or forehead against the door of a building. Although some subsequent facts are in dispute, it is clear that an altercation ensued and that Heidelmeier attempted to arrest and handcuff respondent. Four more Villa Park police officers (the three petitioners here and Genaro Esposito) soon arrived and assisted Heidelmeier in subduing respondent. Pet. App. 5a. After arriving at the police station respondent was treated for trauma and several broken ribs. *Ibid.*

Respondent subsequently was charged in state court with the criminal offenses of disorderly conduct, battery, and resisting arrest; he asserted as a defense that he lacked the

requisite mental state for the offenses charged because he was suffering an adverse insulin reaction at the time of his arrest. Pet. App. 6a. He testified that he had no recollection of what transpired from the time he first felt the insulin reaction until he noticed that he was being dragged up the stairs of the police station. The state trial court

> found that [respondent] came into contact, struck, and resisted a peace officer. Although the judge found [petitioners'] testimony credible and felt that all other elements of the charges against [respondent] had been proven, he concluded that the State had not proven beyond a reasonable doubt that [respondent] acted knowingly. The basis of the finding as to mental state was the testimony concerning [respondent's] diabetes and insulin shock.

Ibid.

Respondent then brought this 42 U.S.C. § 1983 action in the United States District Court for the Northern District of Illinois against petitioners, Heidelmeier, and Esposito. In relevant part, respondent alleged that the officers used excessive force against him and that they were responsible for an illegal arrest, false imprisonment, and malicious prosecution. The parties engaged in discovery during which the depositions of respondent and all of the defendants were taken. The officers stated in discovery that no one beat, struck or abused respondent during the arrest; the three petitioners also testified that their involvement with respondent ended after the arrest was effected and that they saw no one abuse respondent at the police station. Pet. App. 5a. Respondent, in contrast, while asserting that he had been beaten at the time of arrest and at the police station, testified that he was experiencing an insulin reaction when arrested and therefore "disclaim[ed] recollection of specific actions taken by defendants." *Id.* at 6a. He did deny resisting arrest

(*ibid.*) and said he recalled seeing Heidelmeier and Esposito while being beaten at the police station. *Ibid.*[1]

All of the defendants sought summary judgment, arguing as to the excessive force claim that there was absolutely no evidence that they had abused respondent; as for the false arrest and related claims, the defendants contended that the existence of probable cause for arrest established their qualified immunity from suit. The district court denied the motion. On the claim of excessive force, the court concluded that "[p]laintiff lacks eyewitness testimony supporting his theory of the events surrounding his arrest, but there is sufficient circumstantial evidence supporting his theory of the case. While the culpability of particular defendants may vary, on the present record, it cannot be determined whether the claims against them should be dismissed." Pet. App. 8a. The court also held that the false arrest claim should be tried, finding "there is at least some possibility plaintiff could prove lack of probable cause." *Id.* at 10a.

2. Petitioners (but not Heidelmeier and Esposito) filed an interlocutory appeal challenging the denial of summary judgment; as the court below explained, the appeal "assert[ed] the defense of official immunity." Pet. App. 1a. The court of appeals, however, dismissed the appeal as to the excessive force claim for lack of jurisdiction. The court noted that petitioners "are contending that they did not commit the acts of which plaintiff accuses them" and held that "[d]efendants do not deny that *if* they beat the plaintiff * * * then they lack immunity. *Whether* they beat the plaintiff is a question that

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[1] Respondent's doctor stated during discovery that respondent probably would have been weakened by an insulin reaction, but that in a small percentage of cases "a person undergoing an insulin reaction may show greater than normal strength." Pet. App. 6a. The motor deficit from the reaction would resemble that caused by intoxication. *Ibid.*

must be resolved in the district court before it may be reviewed on appeal." *Id.* at 2a (emphasis added). The court premised this holding on the conclusion that "[a] cry of 'we didn't do it' does not present any distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity." *Id.* at 1a-2a.[2]

The court's holding in this case followed from its prior decision in *Elliott* v. *Thomas*, 937 F.2d 338 (7th Cir. 1991), cert. denied, 112 S. Ct. 1242 (1992), that "defendants may urge only legal issues" on interlocutory qualified immunity appeals. Pet. App. 1a. In *Elliott*, the court had reasoned that "the interlocutory appeal to vindicate the [qualified immunity] right not to be tried is unavailable when there is no legal uncertainty; there is no separate 'right not to be tried' on the question whether the defendants did the deeds alleged." 937 F.2d at 341. The rule announced in *Elliott*, and applied in this case, therefore is that a defendant may appeal on grounds of qualified immunity only when he contends "that he acted in the shadow of legal uncertainty"; such an appeal is not cognizable in the Seventh Circuit when the defendant's argument is that he "had nothing to do with the events of which [the plaintiff] complains." *Id.* at 342. The court therefore remanded this case for trial.

SUMMARY OF ARGUMENT

1. The fundamental premise of the decision below — that immunity comes into play only when the defendant official maintains that the law under which he acted was unsettled — is manifestly wrong. Repeated decisions of this

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[2] The court did, however, reverse the district court's denial of summary judgment on the false arrest claim. It found from the undisputed evidence that probable cause to arrest existed and held that the district court erred in denying the motion on the ground that "the plaintiff might come up with more evidence before trial." Pet. App. 2a.

Court make clear that the immunity doctrine protects all officials who did not violate clearly established law, a group that necessarily includes defendants who did not violate the law *at all* because they did not commit the acts alleged or because those acts were lawful. The Court thus held in *Siegert* v. *Gilley*, 500 U.S. 226 (1991), that a suit must be dismissed on immunity grounds when it fails to state a violation of law, and it made clear in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), and *Anderson* v. *Creighton*, 483 U.S. 635 (1987), that immunity entitles the defendant to prevail when, after discovery, the plaintiff has failed to discover evidence that the defendant did what he was alleged in the complaint to have done.

Those decisions follow necessarily from the purpose of the immunity doctrine, which is designed to protect public officials from harassing and vexatious litigation that might inhibit discretionary action, discourage able people from government service, and distract officials from their duties. These policies, which have led the Court to hold generally that insubstantial suits against government officials should be terminated on immunity grounds at the earliest possible point, apply with full force to suits against officials who did nothing wrong. After all, a claim that has no legal or factual basis is at least as insubstantial (indeed, it seems considerably more so) than one in which the relevant law was unsettled.

2. The conclusion that petitioners have asserted an immunity defense resolves the question whether they have a right to interlocutory appeal under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Under *Cohen*, appealability is determined for categories of claims. As a consequence, *Mitchell*'s holding that denials of qualified immunity are subject to interlocutory appeal is dispositive here.

In any event, it is plain that the claim here satisfies the elements of the test for appealability stated in *Cohen*.

Mitchell makes clear that the district court's order conclusively determines the disputed question and that the denial of immunity will be effectively unreviewable on appeal from the final judgment. And the interlocutory order here passes the final prong of the *Cohen* test, for the determination to be made on appeal is separable from the merits; the question whether there is a genuine issue of material fact (the issue for resolution on interlocutory appeal) surely is not identical to the question whether petitioners actually used excessive force against respondent (the issue for resolution at trial). This is particularly so because the Court tolerates a substantial overlap between the interlocutory appeal and the merits when, as in immunity cases, the right not to be tried is at stake.

3. The Seventh Circuit's rule relies on conceptual distinctions that are neither meaningful nor practically administrable. It is settled that an immunity claim must be resolved on the basis of what the defendant actually did, rather than what is alleged in the complaint; where the facts are disputed, on a summary judgment motion the court must determine (to the extent of deciding whether there are disputed issues of material fact) whose version of the facts to accept. Those facts then must be measured against the controlling law.

This means that in a case where there is no genuine issue of disputed fact regarding the defendant's account, the court will determine whether the conduct as described by the defendant violated clearly established law. There is no doubt that an appeal would lie if the legality of the defendant's conduct had been unclear, because the question then would be (in the Seventh Circuit's words) whether the defendant had "acted in the shadow of legal uncertainty." That being so, it makes no sense at all to deny the defendant an appeal because (as here) his conduct was clearly *legal*.

ARGUMENT

The law enforcement petitioners in this case moved for summary judgment, asserting that they were entitled to qualified immunity because the plaintiff failed to establish that their actions had violated clearly established law — or, indeed, that their actions had violated any law at all. The decision below that the denial of such a motion by the district court may not be challenged in an interlocutory appeal is insupportable. The Seventh Circuit's approach has been rejected by a substantial majority of the courts of appeals to address the issue,[3] and for good reason: it frustrates the purposes of the qualified immunity doctrine by permitting the trial of insubstantial suits, departs from this Court's precedents regarding interlocutory appeals, and rests on

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[3] In an opinion by then-Judge Ruth Bader Ginsburg, the District of Columbia Court Circuit *exercised* jurisdiction over an appeal challenging the denial of a fact-based summary judgment motion, although it did not expressly address the jurisdictional issue. *Martin* v. *D.C. Metropolitan Police Department*, 812 F.2d 1425 (D.C. Cir.), vacated in part and en banc rehearing granted, 817 F.2d 144, original opinion reinstated, 824 F.2d 1240 (1987). Five other Circuits — the First, Fourth, Eighth, Ninth, and Tenth — have expressly held that they have jurisdiction to entertain such interlocutory appeals. See *Unwin* v. *Campbell*, 836 F.2d 124 (1st Cir. 1988); *Caro* v. *Aponte-Roque*, 878 F.2d 1 (1st Cir. 1989); *Rogers* v. *Fair*, 902 F.2d 140 (1st Cir. 1990); *Febus-Rodriguez* v. *Betancourt-Lebron*, 14 F.3d 87 (1st Cir. 1994); *Turner* v. *Dammon*, 848 F.2d 440 (4th Cir. 1988); *Wright* v. *South Arkansas Regional Health Center, Inc.*, 800 F.2d 199 (8th Cir. 1986); *Tagstrom* v. *Enocksen*, 857 F.2d 502 (8th Cir. 1988); *Johnson-El* v. *Schoemehl*, 878 F.2d 1043 (8th Cir. 1989); *Kelly* v. *Bender*, 23 F.3d 1328 (8th Cir. 1994); *Burgess* v. *Pierce County*, 918 F.2d 104 (9th Cir. 1990); *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Austin* v. *Hamilton*, 945 F.2d 1155 (10th Cir. 1991).

distinctions that are not meaningful and cannot be sensibly applied. It should be set aside.

A. A Defendant Who Denies Violating The Law At All May Assert Qualified Immunity

1. The basic underpinning of the decision below was the court of appeals' conclusion that this case does not involve immunity *at all*. In the Seventh Circuit's view, immunity comes into play only when the official defendant maintains that the controlling law was unsettled; that court has opined that "interlocutory appeal to vindicate the [qualified immunity] right not to be tried is unavailable when there is no legal uncertainty." *Elliott*, 937 F.2d at 341. It is this "protection from legal uncertainty," the court has reasoned, that is "the genesis of doctrines of official immunity." Pet. App. 2a. This approach, however, is premised on a fundamental misconception of the immunity doctrine. Immunity does not protect only defendants who acted in the shadow of unsettled law. To the contrary, it more broadly shields from suit *all* defendants whose "conduct d[id] not violate clearly established statutory or constitutional rights" (*Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)) — a group that necessarily includes defendants who did not violate the law *at all* because they did not commit the acts alleged or because those acts were lawful.

This understanding follows directly from the rationale for qualified immunity. As the Court explained in *Harlow*, the seminal decision in the area,

> it cannot be disputed seriously that claims [against public officials] frequently run against the innocent as well as the guilty — at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the

> ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

457 U.S. at 814, quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand. J.), cert. denied, 339 U.S. 949 (1950). See *Digital Equipment Corp.* v. *Desktop Direct, Inc*, 114 S. Ct. 1992, 1997 (1994).

The Court elaborated on this understanding in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), explaining that "[t]he conception animating the qualified immunity doctrine as set forth in *Harlow* * * * is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."'" *Id.* at 525, quoting *Harlow*, 457 U.S. at 819, in turn quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967). The Court added that

> the "consequences" with which we were concerned in *Harlow* are not limited to liability for money damages; they also include "the general costs of subjecting officials to the risk of trial — distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." * * * Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as "[i]nquiries of this kind can be peculiarly disruptive of effective government."

Mitchell, 472 U.S. at 526, quoting *Harlow*, 457 U.S. at 816, 817.

These policies plainly apply with equal force to *all* unmeritorious suits against public officials, including those in which the defendant simply did not violate the law, either because the law was settled in his favor or because he did not engage in the illegal conduct alleged. After all, the fear that

an arrest or a search might lead even to a wholly baseless lawsuit (for example, a false allegation of brutality), followed by interminable and expensive discovery and then a trial, might well deter justified and desirable police action in particular cases; fear of such "harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987). In the absence of immunity, this concern inevitably would effect "close decisions" where "public officials should not always err on the side of caution" (*Davis* v. *Scherer*, 468 U.S. 183, 196 (1984)), and at the margins would mean that "talented candidates" are "deterred by the threat of damage suits from entering public service." *Wyatt* v. *Cole*, 112 S. Ct. 1827, 1833 (1992). See *Harlow*, 457 U.S. at 819; *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 240-241 (1974). Immunity therefore is necessary because "officials can act without fear of harassing litigation only if * * * unjustified lawsuits are quickly terminated." *Davis*, 468 U.S. at 195.

By the same token, "[o]ne of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.'" *Anderson*, 483 U.S. at 646 n.6, quoting *Harlow*, 457 U.S. at 817. Again, this policy has nothing whatever to do with whether the official defendant acted under the shadow of legal uncertainty. Instead, it compels the conclusion, as *Harlow* itself put it in unambiguous terms, that all "'insubstantial' suits against high public officials should not be allowed to proceed to trial. * * * We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure." 457 U.S. at 819-820 n.6. See *id.* at 816 ("insubstantial claims should not proceed to trial"). This concern with pretrial termination of "'insubstantial claims'" was "the driving force behind *Harlow*'s substantial reformulation of qualified-immunity

principles." *Anderson*, 483 U.S. at 640 n.2. And a claim that has no legal or factual basis at all is at least as insubstantial — indeed, it seems considerably more so — than one in which the relevant law was unsettled.

It should be added that, while an immunity defense premised on the assertion that the plaintiff's claim is legally or factually insupportable may well echo the defense on the merits, there is more than a semantic distinction between the two; they differ conceptually in a fundamental respect. A defense on the merits, of course, contests ultimate monetary liability. But qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original). See *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). Practical consequences attend this conceptual distinction: defendants asserting immunity have rights to a quick termination of the litigation (including limits on discovery, see *Anderson*, 483 U.S. at 646-647 n.6, and an entitlement to interlocutory appeal) that are unavailable to litigants who defend only on the merits.

2. That the qualified immunity doctrine protects officials who did not violate the law at all is dispositively established by *Siegert* v. *Gilley*, *supra*, where the plaintiff asserted that he was denied due process when the defendant defamed him after the termination of his public employment. The defendant contended both that his conduct was wholly lawful and that, if unlawful, it did not violate law that was clearly established at the time. See 500 U.S. at 229. This Court granted certiorari in the case "to clarify the analytical structure under which a claim of qualified immunity should be addressed." *Id.* at 231.

In doing so, the Court explained that

> A necessary concomitant to the determination of whether a constitutional right asserted by the plaintiff is "clearly

> established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.

500 U.S. at 232. And the Court concluded that the facts of *Siegert* itself "demonstrate[d] the desirability of this approach to a claim of immunity," for the plaintiff there "failed to establish the violation of any constitutional right at all." *Id.* at 233. The Court accordingly ordered the suit dismissed. See *id.* at 234-235.

While *Siegert* holds that a suit must be dismissed on immunity grounds when it fails to state a *legal* claim, *Mitchell* and *Anderson* expressly indicate that immunity entitles the defendant to prevail when, after discovery, the plaintiff has failed to uncover *evidence* that the defendant did what he was alleged in the complaint to have done. Explaining in *Mitchell* that the immunity doctrine requires dismissal of an insubstantial claim on summary judgment, the Court declared:

> Even if the [plaintiff's] complaint adequately alleges the commission of acts that violated clearly established law, *the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.* *Harlow* thus recognized an entitlement not to stand trial or face other burdens of litigation, conditioned on the resolution of the essentially

> legal question whether the conduct of which the plaintiff complains violated clearly established law.

472 U.S. at 526 (emphasis added).[4]

The Court echoed this analysis in *Anderson*. It there observed that resolution of immunity claims often will require examination of the particular circumstances of the case, such as the information possessed by officials conducting a search. 483 U.S. at 641. Against this background, the Court concluded that if actions alleged by the plaintiff are not lawful, "and if the actions [the defendant] claims he took are different from those the [plaintiffs] allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [the defendant's] motion for summary judgment *on qualified immunity grounds* can be resolved." 483 U.S. at 646-647 n.6 (emphasis added). The upshot is plain: the plaintiff's action must be dismissed on immunity grounds if he fails to adduce sufficient evidence that the defendant engaged in conduct that violated clearly established (or, under *Siegert*, *any*) law.

It therefore should come as no surprise that, as we stated at the outset, the Court consistently has defined immunity as protecting not only those officials who acted in the shadow of

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[4] That the Court believed summary judgment in such a factual case should rest on immunity grounds is confirmed by its further observation that "the trial judge may rule * * * that if the facts are as asserted by the plaintiff, the defendant is not immune. At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may thus escape liability. Even so, the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations * * *." *Mitchell*, 472 U.S. at 527 (emphasis in original). The clear implication is that the district court's rejection of the defendant's claim of *factual* innocence involves an assertion of *immunity*.

legal uncertainty (or only those who believed their conduct proper at the time and were taken unawares by a change in the law), but *all* officials who did *not* "violate[] clearly established law." *Mitchell*, 472 U.S. at 530. See, *e.g.*, *Buckley* v. *Fitzsimmons*, 113 S. Ct. 2607, 2513 (1993); *Wyatt*, 112 S. Ct. at 1832; *Hunter* v. *Bryant*, 112 S. Ct. 534, 537 (1991); *Anderson*, 483 U.S. at 638; *Mitchell*, 472 U.S. at 517; *id.* at 537 (O'Connor, J., concurring in part); *Harlow*, 457 U.S. at 818. This conclusion that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law" (*Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)) necessarily reaches an official whose denial of wrongful conduct rests on the claim that "I didn't do it."

3. In addition, the suggestion that immunity comes into play only when the law is unsettled plainly is belied by others of this Court's decisions. In *Hunter* v. *Bryant*, for example, Secret Service agents were sued for making an arrest that assertedly was not grounded on probable cause. This Court summarily reversed the denial of their summary judgment motion. The Court held that "[t]he[] undisputed facts establish that the Secret Service agents are entitled to qualified immunity. Even if we assumed, *arguendo*, that they (*and* the magistrate [who subsequently ordered the plaintiff held without bond]) erred in concluding that probable cause existed to arrest [plaintiff], the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken." *Id.* at 537. While this may or may not have been a sort of legal ("albeit fact-specific" (*Anderson*, 483 U.S. at 641)) determination,[5] the Court made

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[5] Dissenting on the ground that the defendants had not established that a reasonable officer would have believed that probable cause existed, Justice Stevens characterized the Court's decision as engaging in "*de novo* review of a question of fact." 112 S. Ct. at 540.

no suggestion that the controlling law had been unsettled; to the contrary, it indicated that the dispositive standard was more than 25 years old. See *Hunter*, 112 S. Ct. at 537, citing *Beck* v. *Ohio*, 379 U.S. 89 (1964).

Indeed, the suggestion that legal uncertainty is the *sine qua non* of immunity is inconsistent with the decision of the court below to *itself* review an immunity claim that did not involve any assertion of legal uncertainty *in this very case*. Here, the district court denied the defendants' claim that they were entitled to immunity from the plaintiff's contention that they lacked probable cause to arrest him; while the court found no evidence supporting the claim of no probable cause, it concluded that the plaintiff might advance such evidence at trial. Pet. App. 9a-10a. The court of appeals reversed on the ground that a grant of summary judgment is mandatory when the record presents no genuine issue of material fact. Pet. App. 2a-3a. While we certainly agree with this determination, the court of appeals did not suggest — and could not have suggested — that there was any uncertainty about either the controlling legal standard or the lawfulness of the defendants' conduct.

B. An Immunity Defense Of "I Didn't Do It" May Be Raised On Interlocutory Appeal

1. The determination that petitioners have asserted an immunity defense is dispositive of the question whether they have a right to interlocutory appeal under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Mitchell*, of course, held that the denial of a qualified immunity claim *is* subject to appeal under *Cohen* because "[t]he entitlement is an *immunity from suit*." 472 U.S. at 526 (emphasis in original). And the *Cohen* doctrine provides that "the issue of appealability under § 1291 is to be determined for the *entire category* to which a claim belongs." *Digital*, 114 S. Ct. at 1996 (emphasis added). See *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988) ("[i]n

fashioning a rule of appealability under § 1291, * * * we look to categories of cases"); *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 439 (1985); *Carroll* v. *United States*, 354 U.S. 394, 405 (1957). This means that all claims in the "immunity category" may be raised on interlocutory appeal.

Any departure from this principle in the circumstances of this case presumably would have to be grounded on the conclusion that the *particular* immunity claim here really is a "defense on the merits." *Elliott*, 937 F.2d at 341. But the Court "has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal." *Richardson-Merrell*, 472 U.S. at 439. Thus, when the Court determines that a given category of claims (for example, those involving *forum non conveniens*) are not subject to interlocutory appeal because they typically involve a substantial overlap with the merits, it precludes appeal even of those *forum non conveniens* claims that would "not require significant inquiry into the facts and legal issues presented by the case." *Van Cauwenberghe*, 486 U.S. at 529. By the same token, once the Court determines that a particular category of claims (for example, those involving double jeopardy) *is* subject to interlocutory appeal, it does not preclude even those appeals within that category of claims that do require some consideration of the merits.[6] That should be the end of the matter here; having determined that qualified immunity claims may be raised on appeal, the Court should not separate out such claims involving an "I didn't do it" defense.

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[6] Some double jeopardy claims "may depend entirely on the task of determining whether the charged offense is the same as the offense charged in an earlier proceeding. This inquiry may be deeply dependent on the facts." 15A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, §3911.2, at 389 (1992).

While the Seventh Circuit thought this conclusion inconsistent with *Mitchell*, see *Elliott*, 937 F.2d at 342, nothing in that decision limits the right to appeal in quite the way the court of appeals supposed. To be sure, *Mitchell* focused on the claim before it, which involved the assertion that a particular rule of law had not been clearly established at the time of the defendant's conduct — an assertion that was in some measure distinct from the merits.[7] See 472 U.S. at 528 & n.9. But as we have explained (at pages 13-14, *supra*), the Court also took pains in *Mitchell* to emphasize that the defendant is entitled to summary judgment on qualified immunity grounds "if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed th[e] acts" asserted by the plaintiff. *Id.* at 526. It hardly would have made sense for the Court to do so had it meant to preclude appeals in such cases when summary judgment is denied. And *Mitchell*'s "repeated references to denial of a defendant's motion for summary judgment * * * seem to support appeal even though the only question is whether the summary judgment standard was properly applied." 15A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 3914.10, at 653 (1992). As a consequence, as Judge Richard Arnold wrote for the Eighth Circuit, if permitting interlocutory appeals in "I didn't do it" cases "is a step beyond *Mitchell*, it is a small one, and one fully consistent with the spirit and purpose of the Supreme Court in that opinion." *Wright* v. *South Arkansas Regional Health Center, Inc.*, 800 F.2d 199, 203 (8th Cir. 1986).

2. Because the court of appeals' analysis was infected by its conclusion that an immunity defense is altogether unavailable when the public official's defense is "I didn't do it," that court nowhere considered application of the *Cohen* test governing so-called collateral order appeals. While

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[7] But by no means entirely. See pages 22-23 & n.9, *infra*.

Mitchell makes application of that test to the particular facts here unnecessary, it is plain that, on examination, the requirements of *Cohen* are satisfied.

The Court concluded in *Cohen* that an order is a "final decision" for purposes of § 1291 if it is "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U.S. at 546-547. In *Cohen*'s oft-repeated formulation, these are orders that

> finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

Id. at 546. As more recently restated by the Court, the *Cohen* standard is satisfied if the order "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [will] be effectively unreviewable on appeal from the final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted). See *Richardson-Merrell*, 472 U.S. at 431.

There can be no doubt that the first and third of these requirements are satisfied here. As the Court explained in *Mitchell*, the district court's "denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because '[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred,' it is apparent that *Cohen*'s threshold requirement of a fully consummated decision is satisfied in such a case." 472 U.S. at 527, quoting *Abney* v. *United States*, 431 U.S. 651, 659 (1977). Similarly, because "[t]he entitlement is an

immunity from suit" that "is effectively lost if a case is erroneously permitted to go to trial," "the district court's decision is effectively unreviewable on appeal from a final judgment." *Id.* at 527, 526 (emphasis in original). See *Cohen*, 337 U.S. at 546 (after trial the asserted right "will have been lost, probably irreparably"). See generally *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. 495, 498-500 (1989); *Van Cauwenberghe*, 486 U.S. at 523.

3. a. The remaining *Cohen* standard also is satisfied here: the determination to be made on appeal in this case is separable from the merits. The question whether a genuine issue of material fact exists regarding particular issues in the case — the question to be resolved on interlocutory review — plainly is distinct from the question for trial, which is whether the defendants *actually* committed the acts alleged. Again, as Judge Arnold wrote for the Eighth Circuit,

> the issue is, on close analysis, separable from the merits. To put it in terms of the present case, the issue is not whether the defendant [committed the alleged act] in fact, but, rather, whether, when all the facts are viewed in the light most favorable to the plaintiff, there is any genuine issue, triable to a jury, of improper [action].

Wright, 800 F.2d at 203.[8] And this legal issue is not one that survives the trial, since a court of appeals "will not review a claim by a losing defendant that, even though there

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[8] See also *Kelly* v. *Bender*, 23 F.3d 1328, 1330 (8th Cir. 1994) "[w]e have jurisdiction over this appeal because, although largely fact-based, it presents the legal question of whether [plaintiff] raised a genuine issue of material fact regarding whether the [defendants'] conduct violated his clearly established rights"); *Burgess* v. *Pierce County*, 918 F.2d 104, 106 (9th Cir. 1990) ("the question of immunity is conceptually divisible from plaintiff's claim on the merits, since it is the legal question of whether there are genuine issues for the jury").

is a jury verdict against him supported by adequate evidence, the district court prior to trial (when the written record was sparser and harder to understand) should have granted summary judgment in his favor." *Unwin* v. *Campbell*, 863 F.2d 124, 139 (1st Cir. 1988) (Breyer, J., dissenting).

This conclusion draws considerable support from the decisions of this Court that dismissed appeals on grounds of lack of separability. Those decisions have tended to emphasize that resolution of the issue raised on interlocutory appeal would have required an analysis of the likely outcome of the trial, an assessment of "a full trial record," or an examination of proof to be offered at trial. C. Wright, A. Miller, & E. Cooper, *supra*, § 3911.2, at 384. See, *e.g.*, *Richardson-Merrell*, 472 U.S. at 439 (must assess the effect of the "ruling on the final judgment" or "the likely course of the trial"); *Van Cauwenberghe*, 486 U.S. at 528 (must consider "what proof is required" at trial). Compare *Mitchell*, 472 U.S. at 529-530 n.10. In contrast, resolution of a summary judgment motion and subsequent appeal does not require any prediction regarding the course or outcome of the trial.

This understanding also accords with the purposes of the separability requirement. Separability "helps protect against repetitive consideration of the same matters by the court of appeals" and "helps improve the quality of judicial review — if the matter is one whose decision is 'affected by' decision on the merits, review before trial on the merits might reach a result that would not be accepted on later appeal." 15A C. Wright, A. Miller, & E. Cooper, *supra*, § 3911, at 333. See *id.* § 3911.2, at 379-380; *Van Cauwenberghe*, 486 U.S. at 527-528. But review of the summary judgment record with an eye towards identifying issues of fact that need *later* resolution has only the most general overlap with a subsequent review of the verdict after trial; the same record is not being reviewed twice, and (as noted above) the court of appeals' determination regarding the existence of genuine

issues cannot be inconsistently revisited (or revisited at all) at a later date.

b. To say this, of course, is nevertheless to acknowledge that there is *some* degree of overlap between the immunity determination and the merits; a reviewing court must familiarize itself with the plaintiff's legal allegations and with some of the sorts of evidence that might be advanced at trial. But at least in the immunity context, the Court has expressly rejected the argument that this type of "factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of immediate appealability." *Mitchell*, 472 U.S. at 529 n.10. The Court thus "has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing Court must consider the plaintiff's factual allegations in resolving the immunity issue." *Id.* at 528-529. See *id.* at 528 (resolution of appellate issues "will entail consideration of the factual allegations that make up the plaintiff's claim for relief").

It hardly could be otherwise, for review of an immunity claim *always* will entail substantial overlap with the merits, at least in the narrow sense that familiarity with the legal allegations and the pretrial record will be necessary. When the immunity claim is that the law was not clearly established, the court will have to review both the legal theory of the complaint and the law stating the relevant legal standard; when the defendant maintains that his conduct did not violate the law (or did not violate clearly established law), the court will have to review the factual record. That much is clear from this Court's decisions, which have evaluated immunity claims — *on interlocutory appeal* — by examining the defendant officials' challenged conduct (see, *e.g.*, *Hunter*, 112 S. Ct. at 537) or the plaintiff's factual allegations and legal theory (see, *e.g.*, *Siegert*, 500 U.S. at 233-235) in

considerable detail. No Justice has suggested that the Court lacked jurisdiction to entertain these claims.[9]

c. The Court has found these appeals to satisfy the *Cohen* test because, whatever the factual overlap between the interlocutory appeal issue and the merits, "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is *conceptually distinct* from the merits of the plaintiff's claim that his rights have been violated." *Mitchell*, 472 U.S. at 527-528 (emphasis added). The Court has applied this "conceptual distinctness measure of separability" (15A C. Wright, A. Miller, & C. Cooper, *supra*, § 3911.2, at 388) where "'the essence' of the claimed

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[9] As Professors Wright, Miller, and Cooper have observed:

> Since decision of the appeal will require a close appraisal of the facts, whether those alleged or those that need be sorted out from a summary judgment record and found worthy of being assumed, this form of separability does not rest on the prospect that the court of appeals will avoid the risk of refamiliarization with the facts on a subsequent appeal. The only thing that can be said with confidence is that appraisal of the facts is likely to be more curtailed than on appeal from a final judgment.

15A C. Wright, A. Miller, & E. Cooper, *supra*, § 3911.2, at 387. They added:

> there can be no dispute that the legal question on appeal, whether a given set of assumed facts involves violation of a clearly established legal norm, is manifestly tied to those facts. Denial of the claim of immunity on those facts often will be followed by further proceedings that establish a different factual predicate for decision, and an ensuing appeal that requires a second survey of essentially the same terrain.

Id. at 388.

right [to appeal] is a right not to stand trial" (*Van Cauwenberghe*, 486 U.S. at 524) that is expressly grounded in the Constitution or a statute, or has "a good pedigree in public law." *Digital*, 114 S. Ct. at 2000. The Court consistently has permitted interlocutory appeals in such cases under *Cohen*. See *Abney* v. *United States*, 431 U.S. 651, 659, 661 (1977); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982); *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979).

This approach, which permits interlocutory appeals when an important and *bona fide* right not to be tried is at stake, is not a departure either from *Cohen* or from the rule of finality. "[A]s Mr. Justice Jackson, the author of *Cohen* later pointed out: '[I]t is a final *decision* that Congress has made reviewable. ... While a final judgment is always a final decision, there are instances in which a final decision is not a final judgment.'" *Abney*, 431 U.S. at 658, quoting *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (opinion of Jackson, J.). And because the Court has frankly recognized that "it is impossible to devise a formula to resolve all marginal cases coming within what might be called the 'twilight zone' of finality," it has "held that the requirement of finality is to be given a 'practical rather than a technical construction.'" *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964), quoting *Cohen*, 337 U.S. at 546. See *Abney*, 431 U.S. at 658.

Against this background, the Court has explained that classes of interlocutory district court rulings must be treated as final "decisions" even though they do not terminate the litigation because doing so is necessary to serve the interest of "'achieving a healthy legal system'" and "efficient administration of justice in the federal courts" (*Digital*, 114 S. Ct. at 1995, 1996) -- the ultimate goals of the finality rule. With these considerations in mind, "[t]he greater the risk that an important matter may evade review, and particularly the greater the risk of hardship if present review is denied, the less strict is the insistence on separability." 15A C. Wright,

A. Miller, & E. Cooper, *supra*, § 3911.2, at 379. See *id.*, § 3911, at 335-336. And when denial of immediate appeal "would result in irreparable injury" (*Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 441 (1956) (opinion of Frankfurter, J., joined by Harlan, J.)) by destroying a right not to stand trial, the "right affected by the ruling can and should be protected by appeal prior to judgment." *Richardson-Merrell*, 472 U.S. at 436.

It may be added that rejection of the Seventh Circuit's rule will not have adverse effects on "efficient judicial administration." *Richardson-Merrell*, 472 U.S. at 430. It will not materially increase the number of interlocutory appeals because most courts to have addressed the issue now permit interlocutory challenges to the denial of summary judgment motions such as the one in this case. See note 3, *supra*. While the Court has expressed the concern that too-ready a recourse to the *Cohen* doctrine would have the finality rule "swallowed by ever-multiplying exceptions" (*United States* v. *Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 270 (1982) (per curiam)), that is not a danger here; any rule announced in this case will be limited to immunity appeals, which the Court *already* has held to fall under *Cohen*. And this is not a situation "'where the result of review will be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of [the] litigation."' *Stack*, 342 U.S. at 12 (opinion of Jackson, J.), quoting *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940). Official immunity is not a routine claim that "happen[s]" to arise in the course of a lawsuit; it is a safeguard that the Court has recognized as essential to the healthy functioning of the polity.

C. The Court Of Appeals' Rule Cannot Be Meaningfully Applied

The Seventh Circuit's approach thus finds no support in *Mitchell*, in the *Cohen* doctrine, or in the law of immunity.

But there is more wrong with it than that: the court of appeals' conclusion relies on conceptual distinctions that ultimately are not meaningful and cannot be sensibly drawn in practice.

1. At the outset, the Seventh Circuit's insistence that "legal uncertainty" is the indispensable component of an immunity claim (*Elliott*, 937 F.2d at 343) will lead to perverse results. We know from *Anderson* and *Mitchell* that the immunity inquiry must look to the particular conduct engaged in by the defendant. See 483 U.S. at 641; 472 U.S. at 526-527. Thus, as the First Circuit has observed, "[u]nder *Anderson*, the proper inquiry must take into account how th[e] general right [asserted by the plaintiff] applies to the particular facts, including a public official's actual conduct." *Unwin*, 863 F.2d at 131.[10] A district court therefore must determine whether what the defendant *actually did* violated clearly established law.

This being so,

> it would make no sense to hold that while a district court must look beyond the complaint, the court of appeals may not. After *Anderson*, a district court is required to examine whether facts gathered through discovery (including facts concerning a defendant's conduct) create a genuine issue of fact regarding the issue of qualified immunity. A court of appeals, on interlocutory review

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[10] As the First Circuit explained (*Unwin*, 863 F.2d at 131), the passage in *Anderson* noting that discovery may be necessary prior to resolution of a qualified immunity summary judgment motion (483 U.S. at 646-647 n.6) cited to *Mitchell*, 472 U.S. at 526, which states that "[e]ven if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts."

> of such a lower court decision, cannot confine itself to just the allegations in the complaint.

Unwin, 863 F.2d at 132. The Seventh Circuit itself acknowledged this very point (see *Elliott*, 937 F.2d at 342), noting that every Circuit has rejected the rule of *Bonitz* v. *Fair*, 804 F.2d 164 (1st Cir. 1986), overruled by *Unwin*, 863 F.2d at 130-133, which had held that the courts of appeals could not look beyond the allegations of the complaint in reviewing the denial of motions seeking summary judgment on immunity grounds. Instead, courts of appeals must examine the entire summary judgment record.

So, for example, if a plaintiff alleges that the defendant engaged in a particular act (say, that he violated the Fourth Amendment because he seized contraband that was not in plain view) and the defendant responds that he engaged in different conduct altogether (say, that he seized the contraband because it *was* in fact in plain view), the court will have to determine whether the plaintiff's version is supported by the record before determining whether the defendant's conduct was inconsistent with clearly established law. If the plaintiff's evidence does not raise a genuine issue of material fact regarding the defendant's story, the court will have to determine whether the conduct *as described by the defendant* violated clearly settled law. And there is no doubt that appeal would lie if the legality of the defendant's conduct had been unclear (if, for example, the scope of the plain view doctrine had been unsettled), because the question then would be whether the defendant had "acted in the shadow of legal uncertainty." *Elliott*, 937 F.2d at 342.

In that light, it makes no sense at all to deny the defendant an appeal because it was clear that his conduct was *legal*. "To afford the * * * defendant[] immunity only if the law had been a little less favorable to [him] would seem ridiculous." *Unwin*, 863 F.2d at 133 n.9. But that is the upshot of the Seventh Circuit's approach: if the legality of

seizing contraband that was in plain view had been clear (as it was clear here that it was legal *not* to beat a suspect during an arrest), appeal would not lie. If there had been some uncertainty about the scope of the plain view doctrine, however, the court would have jurisdiction to entertain the appeal. This outcome may charitably be termed peculiar.

The Seventh Circuit's rule, moreover, will lead to bizarre results in a host of everyday situations. Imagine a case like *Hunter*, for example, in which the plaintiff asserts that the defendant law enforcement officers had no probable cause to arrest him. The defendants move for summary judgment, asserting that plaintiff was arrested because he was brandishing a gun; they assert that the arrest was lawful and that, if it was not, the law was unsettled on whether the plaintiff's action gave them probable cause to arrest. For his part, the plaintiff asserts that he had no gun at all. The district court denies the summary judgment motion. On interlocutory appeal, the appellate court finds that there is no evidence supporting (and therefore no genuine issue of material fact regarding) the plaintiff's assertion that he did not have a gun — and it further finds that *clearly settled* law at the time of the incident established (and established with crystal clarity) that police officers *did* have probable cause to make an arrest when the suspect was brandishing a gun. This determination establishes that there had been no legal uncertainty at the time of the arrest. And because the Seventh Circuit holds that jurisdiction exists only when the defendant acted in the shadow of legal uncertainty, its rule would seem to require that the appeal be dismissed. Having found that the defendant did nothing wrong, the court nevertheless would have to remand the case for trial.

The preposterous case just hypothesized is essentially the one involved here: under petitioners' version of the facts it is plain that they did nothing wrong. The only difference between the cases is that here the defendants failed to *argue* that there had been any uncertainty in the state of the law. If

that manipulable consideration is dispositive, however, the doctrine of *Harlow* "would be transformed from a guarantee of immunity into a rule of pleading." *Anderson*, 483 U.S. at 639.[11] This makes clear, we submit, that the Seventh Circuit's rule must fall of its own weight.

Indeed, the Seventh Circuit in *Elliott* (937 F.2d at 341) itself recognized the slipperiness of its distinction. The court opined in that case, which involved a claim that the plaintiff was beaten by police when taken into custody, that

> [b]y sleight of hand you can turn any defense on the merits into a defense of qualified immunity. Consider this possibility for the police officers Elliott has sued: It was not "clearly established" in May 1986, when we arrested Elliott, that police officers could be liable for taking peaceable custody of a suspect; the district court proposes to hold a trial at which the only outcome favorable to plaintiff (given the uncontroverted evidence that Elliott suffered no injury) would be a holding that police *are* liable for making arrests that cause no injury; that would be a change of law, which we cannot be expected to forecast; therefore we are entitled to qualified immunity. The parenthetical expression carries the entire weight of this "argument": if you allow the possibility

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[11] It is no answer to this point to say that petitioners here could not reasonably have been in doubt about the lawfulness of their conduct if (as they say) they simply took a suspect into custody. Appeals would become impossibly cumbersome (as well as wholly removed from the purposes of the immunity doctrine) if jurisdiction turned on whether law that was in fact clearly settled in the defendant's favor could reasonably have been thought unclear. And it would be possible to rephrase any defense (except, perhaps, one of mistaken identity) in terms that suggest legal uncertainty; here, for example, petitioners could have contended that the law was unclear on how much force may be exerted against suspects who resist arrest.

> that the suspect will show injury at trial, then the defendants may be held liable under the law as it existed in 1986. So the claim to immediate appellate review collapses to the argument that the "right not to be tried" can be vindicated only if the court of appeals combs through the factual record.

The flaw in this analysis is that the Seventh Circuit's reasoning itself collapses once it is recognized that courts of appeals may — and, indeed, must — "comb through the factual record" when the plaintiff and defendant present varying versions of the relevant events. As we have explained, that is the plain import of *Mitchell* and *Anderson*. Moreover, the Court more recently saw "little basis for drawing * * * a line" between "cases in which the determination of * * * immunity is bound up with factual complexities whose resolution requires trial and cases in which it is not." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 687 (1993), citing *Mitchell*, 472 U.S. at 529-530 & n.10.[12] And at the risk of belaboring the point, we note again that nothing in the purposes of the immunity doctrine is served by permitting courts of appeals to review the record in this manner only when the claim of immunity is grounded on an assertion that the law is unclear.

As the leading commentators in the field have put it, while "[t]he task of appellate decision would be simplified" if "[i]mmunity appeals * * * could be limited to cases presenting neat abstract issues of law,"

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[12] Similarly, in *Harlow* summary judgment had been denied because genuine issues of material fact existed (see 457 U.S. at 805-806); the Court declined a request that it resolve the summary judgment dispute not because it lacked jurisdiction, but because the trial court was more familiar with the record. *Id.* at 819-820. See also *Malley*, 475 U.S. at 350 (opinion of Powell, J., joined by Rehnquist, J.).

> it is difficult to find anything in the *Mitchell* decision that explains why these benefits offset the costs to official defendants. The burdens of proceeding through pretrial preparation and trial are if anything likely to be greater when the dispute turns primarily on fact disputes than when it turns primarily on issues of law. Public officials will be distracted from the responsibilities of office, and people contemplating appointment to public office may fear fact-based litigation as much as law-disputed litigation. * * * The logic of permitting appeals on legal issues is difficult to distinguish from the logic of permitting appeals on fact issues.

15A C. Wright, A. Miller, & E. Cooper, *supra*, § 3914.10, at 664 (emphasis added). Professors Wright, Miller, and Cooper therefore concluded that a rule "that appealability should not depend on the 'factualness' of the issues presented" "deserves general adoption." *Ibid.*

2. It should be added that, for similar reasons, the Seventh Circuit was wrong in reasoning that a defense that the defendant did not commit the acts alleged by the plaintiff raises factual issues that do not qualify for interlocutory appeal under *Mitchell*'s holding that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291." 472 U.S. at 530. When there is no genuine issue of material fact, the defendant's entitlement to summary judgment *is* an issue of law under Fed. R. Civ. P. 56. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This principle applies to motions for summary judgment based on qualified immunity just as much as it does to other summary judgment motions. See, *e.g.*, *Wright*, 800 F.2d at 203; *Martin*, 812 F.2d at 1434. Of course, the question on such a motion is, as then-Judge Breyer observed, a "fact-specific

legal question." *Unwin*, 863 F.2d at 138 (Breyer, J., dissenting). But under *Anderson* a court always will have to resolve such fact-specific preliminary disputes on its way to resolving the ultimate question "whether the defendant's *specific* conduct in his *specific* situation was, or was not, clearly prohibited by law" (*id.* at 1390); as we have noted, the court will have to determine what the defendant actually did (insofar as that can be done at the summary judgment stage) before it is able to determine the legality (or clear illegality) of that conduct. Of course, the answer to the ultimate question will be easy when (as here) the defendant's conduct was permitted by law.

3. Finally, the policies underlying this Court's qualified immunity decisions would be thwarted by a rule precluding immediate appeal from the denial of a summary judgment motion, made after discovery, premised on the defense that the defendant did not commit the acts alleged by the plaintiff. Again, it bears emphasis that one of the primary purposes of qualified immunity is to permit "the dismissal of insubstantial lawsuits without trial." *Harlow*, 457 U.S. at 814. "The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation * * * only if unjustified lawsuits are quickly terminated." *Davis*, 468 U.S. at 195. As a consequence, the Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter*, 112 S. Ct. at 536. And "absent immediate appeal, the central benefits of qualified immunity — avoiding the costs and general consequences of subjecting public officials to the risk of discovery and trial — would be forfeited." *Puerto Rico Aqueduct Authority*, 113 S. Ct. at 687. See *Wright*, 800 F.2d at 203.[13] "The

[13] A governmental defendant's right not to stand trial is just as effectively lost if the court of appeals does not entertain an appeal from a legally erroneous denial of summary judgment, as here, as it is if the district court declines to rule on the summary

importance of this consideration hardly need emphasis." *Harlow*, 457 U.S. at 814 n.23.

The contrary rule announced by the Seventh Circuit, if allowed to stand, would have significant practical consequences. Cases like *Mitchell*, in which the constitutionality of the defendant's actions is genuinely unsettled at the time he acts, are relatively rare. More common are cases involving factually insupportable accusations by disgruntled plaintiffs, such as the allegations by respondent here. As this Court recognized in *Anderson*, *Mitchell*, *Davis*, and *Harlow*, such cases, if not expeditiously terminated, pose a substantial danger of chilling public officials in the legitimate exercise of their governmental duties. Yet it is appeals from precisely this class of cases that the court below has refused to entertain. This is a perverse result, for it forces the victims of the most insubstantial claims to go through trial. The extraordinary damage caused by such a rule explains why 45 States, the International City/County Management Association, the National Institute of Municipal Law Officers, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the District of Columbia, the Commonwealth of Puerto Rico, and the Territory of Guam have filed as *amici* in support of petitioners.

Moreover, as a matter of policy an official who did nothing even arguably wrong is at least as deserving of the interlocutory appeal authorized by *Mitchell* as is an official whose conduct was arguably, but not clearly, unconstitutional at the time he acted. And where the plaintiff cannot adduce any evidence establishing that the official committed the acts alleged, a motion for summary judgment should be granted, or the appeal of its denial allowed, to further the policy served by *Mitchell* of sparing the official and the courts the

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judgment motion in the first place. *Unwin*, 863 F.2d at 132.

time and expense of a trial, the result of which is a foregone conclusion. "[T]he purpose of qualified immunity is to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury." *Slattery* v. *Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (Powell, J., sitting by designation) (citing *Mitchell*, 472 U.S. at 526).

In addition, the decision below does more than burden public officials; it also creates a complex rule that will, in practice, be extraordinarily difficult to apply. It often will be unclear whether the defendant genuinely "acted in the shadow of legal uncertainty" (*Elliott*, 937 F.2d at 342), and thus has a proper appeal, or merely "ma[d]e * * * a stab at presenting a legal issue" (*ibid.*), and therefore does not. Since qualified immunity is a highly fact-specific inquiry (see *Anderson*, 483 U.S. at 641), and there is usually some dispute (whether material or not) about the facts, the parties and the court often will have to devote considerable effort to determining whether the defendant really is arguing (and is arguing legitimately) that there were doubts about the controlling law. While this Court "has expressly rejected efforts to reduce the finality requirement of [28 U.S.C.] § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal" (*Richardson-Merrell*, 472 U.S. at 439), such a determination will be required for qualified immunity appeals after this decision.

In sum, the decision below will have perverse and destructive consequences. It will substantially reduce the efficacy of qualified immunity as a protection for diligent and conscientious public officials. And it will create enormous problems of judicial administration that greatly outweigh any benefit that would follow from a reduction in the number of interlocutory appeals. That decision should be reversed by this Court.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

MARK F. SMOLENS
Flynn, Murphy, Ryan & Seyring
Suite 3232
30 North LaSalle Street
Chicago, Illinois 60602
(312) 372-3800

CHARLES A. ROTHFELD*
MYLES R. HANSEN
GARY A. ORSEK
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 778-0616

**Counsel of Record*

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In The

Supreme Court of the United States

October Term, 1994

TYSON JOHNSON, ROBERT DEEVEY
AND JOHN PAYNE,

Petitioners,

v.

HOUSTON JONES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT

ANTHONY PINELLI
Attorney at Law
221 North LaSalle Street
Suite 2100
Chicago, Illinois 60601
(312) 641-0590

EDWARD G. PROCTOR, JR.*
SANDMAN, LEVY and PETRICH
134 North LaSalle Street
Suite 1323
Chicago, Illinois 60602
(312) 726-1692

*Counsel of Record

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QUESTION PRESENTED

Whether a district court's refusal to grant summary judgment to a defendant who asserts a defense premised entirely upon a denial of committing any wrong, although otherwise unappealable, may be appealed immediately as a collateral order if the defendant is a public official who also asserts a qualified immunity defense.

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No. 94-455

In The

Supreme Court of the United States

October Term, 1994

TYSON JOHNSON, ROBERT DEEVEY AND JOHN PAYNE,

Petitioners,

v.

HOUSTON JONES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-3a) is reported at 26 F.3d 727. The opinion of the district court (Pet.App.4a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1994. The petition for a writ of certiorari was filed on September 12, 1994, and was granted on January

6, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * ."

42 U.S.C. § 1983 provides in relevant part: Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory * * * subjects * * * any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law * * * ."

STATEMENT

1. On November 6, 1990, HOUSTON JONES had just purchased a few items at a grocery store near his residence after work and walked through the store parking lot to his vehicle. When he arrived at his car, he began experiencing physical manifestations of hypoglycemia, or more commonly known as insulin reaction. HOUSTON JONES proceeded to a muffler shop which was behind the store's parking lot and was found there by the muffler shop attendant hitting his forehead against an aluminum back door to the shop. Pet.App.5a. John Heidelmeier, an officer of the Villa Park, Illinois, Police Department,

responded to the report of an apparently intoxicated man at a muffler shop. When Heidelmeier arrived at the scene, he found HOUSTON JONES hitting his forehead against the aluminum door of the muffler shop building. Heidelmeier then approached HOUSTON JONES in an attempt to ascertain whether there was a problem. Pet.App.5a.

Unable to obtain a coherent response from HOUSTON JONES, Heidelmeier assumed he was intoxicated and decided to arrest him. Pet.App.5a. Upon reaching for HOUSTON JONES, who was faced away from Officer Heidelmeier, HOUSTON JONES swung a hand backwards at Heidelmeier. Heidelmeier then placed HOUSTON JONES in an arm lock and slammed him to the ground. Four more Villa Park police officers soon arrived and participated in the arrest. Pet.App.5a. From this point, the parties' version of the facts diverge.

HOUSTON JONES remembers specifically Officers Esposito and Heidelmeier administering repetitive blows and verbal abuse to him at the police station.[1] After a significant period of time at the station, Officer PAYNE, a petitioner in this appeal, suggested that an ambulance be called. HOUSTON JONES was then taken to the hospital and treated for multiple trauma and several broken ribs. Pet.App.5a. He remained in the hospital for several days recovering from his injuries.

HOUSTON JONES was charged in State court with the criminal offenses of disorderly conduct, battery upon

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[1] Officers Esposito and Heidelmeier were not part of the appeal taken to the Circuit Court of Appeals.

a police officer, and resisting arrest. At the trial in State court, his physician testified that as a consequence of him experiencing an insulin reaction at the time of his arrest, his recollection of relevant events would be very poor and he would probably have been greatly weakened. Pet.App.6a. However, according to his doctor, during an insulin reaction, he could be coherent for brief periods of time and could engage in conversation and control motor functions. Pet.App.6a. His coherence at the police station is evident in that the police officers' reports state that he was telling them, at that time he was a veteran of war and that he is a diabetic and needed medical assistance. The State trial court acquitted Houston Jones of the criminal charges brought against him finding that it was not proved beyond a reasonable doubt that Houston Jones had the mental capacity to commit the crimes of which he was charged. Pet.App.6a.

HOUSTON JONES then brought this civil rights action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Illinois against petitioners, JOHNSON, DEEVEY and PAYNE, and also against Officers Heidelmeier and Esposito, who are not part of this appeal. In relevant part, HOUSTON JONES alleged that the officers who are the Petitioners in this appeal, condoned the use of excessive force against him and that they were responsible because the beatings and abuse occurred in their presence.

The parties engaged in discovery during which time the depositions of the plaintiff and all of the defendants were taken. The officers denied that they beat, struck or abused the plaintiff during the arrest or at the police station. These denials are contrary to and directly in the

face of their own admissions and police reports which show that they were the only officers engaged in the arrest and post-arrest processing at the station. The denials are also inconsistent with the medical evidence and other circumstantial evidence in the record which points to their involvement. Their roles at the station varied, but it became evident that they were all present at some point during the period of time which HOUSTON JONES testified the abuse occurred. Pet.App.5a, 7a. The officers have also stated in their reports and at their depositions that it was a tremendous struggle to subdue HOUSTON JONES because of his super-human strength; however, that testimony was directly contradicted by a medical doctor at the criminal trial who testified that a person suffering insulin reaction would be in a significantly weakened physical condition.[2]

Petitioners Johnson, Deevey and Payne moved for summary judgment, on the Plaintiff's excessive force claim, arguing that there was not a scintilla of evidence that they had abused HOUSTON JONES at the scene of the arrest or in a police station. The district court denied the motion finding that there was sufficient circumstantial evidence supporting the plaintiff's theory of the case against these defendants. Pet.App.8a. The district court followed the law in the Seventh Circuit which is that even if a police officer does not actually participate in a beating, a jury may consider an excessive force claim against him if the officer stood by and allowed others to beat the

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[2] The transcript of the state court criminal proceedings and trial was part of the record on summary judgment and these materials were provided to the district court judge.

plaintiff. *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972); *Wilson v. City of Chicago*, 707 F.Supp. 379 (N.D.Ill. 1989). This law has recently been affirmed in the case *Yang v. Hardin*, 37 F.3d 282 (7th Cir. 1994).

2. Petitioners, Johnson, Deevey, and Payne, filed an interlocutory appeal challenging the denial of summary judgment. The appeal asserted the defense of qualified immunity and basically reiterated their position that not a scintilla of evidence exists that petitioners, Johnson, Deevey or Payne, ever struck, punched or kicked the plaintiff, or observed anyone striking, punching or kicking the plaintiff. Pet.App.2a. The veracity of these allegations was directly challenged by the plaintiff in his response to the defendants' motion for summary judgment and is belied by the ample circumstantial evidence. The court of appeals properly dismissed the appeal as to the excessive force claim for lack of jurisdiction. The court of appeals determined that whether these police officers beat the plaintiff or whether they were in the presence of said beatings must be resolved in the district court before it may be reviewed on appeal. Pet.App.2a. The court of appeals correctly found that a cry of "We didn't do it" does not present any distinct legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity. Pet.App.1a, 2a.

The court of appeals reasoned that it was being asked to do nothing other than address an exclusively factual question and was being asked to make a determination that the district court improperly found that there were questions of fact as to whether these petitioners are liable for the alleged abuses to the respondent. The court of appeal's holding in this case followed from its prior

decision in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir.1991), cert. denied, 112 S.Ct. 1242 (1992).

The question presented in *Elliott* was whether a court's refusal to grant summary judgment to a defendant who denies committing any wrong may be appealed immediately as a collateral order on the authority of *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The court in this case, as it did in *Elliott*, reasoned that to state this question is to answer it. A defense of no wrong doing is not collateral to the merits; it is the nub of the case. The court of appeals held that it lacked jurisdiction to entertain the petitioners' interlocutory appeal. Accordingly, the appeal was dismissed as to the excessive force claim brought in the guise of a qualified immunity defense and the case was remanded for trial.

SUMMARY OF ARGUMENT

In *Harlow v. Fitzgerald*, 475 U.S. 800 (1982), this Court articulated the doctrine of qualified immunity. In that decision and in *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court ruled that a public official who does not violate the law, as it has been "clearly esatablished" at the time, is entitled to a dismissal of claims against him before trial. Qualified immunity, as authored by this Court, establishes a right to a disposition on the merits without trial.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), it was determined that qualified immunity is an entitlement not be forced to trial regarding the claim of official misconduct on the basis that is conceptually distinct from the

merits of a plaintiff's complaint that he has been damaged by a violation of his rights. *Mitchell v. Forsyth* established that a denial of this entitlement was appropriate for appellate review through an interlocutory appeal. In that opinion, the Court focused on the issues which arose as a result of the Attorney General who had violated "clearly established law." Under the facts supporting that decision, no real contest existed as to the facts regarding the actions alleged by plaintiff. Indeed, the Court noted that when reviewing a question of qualified immunity on interlocutory appeal, a court of review "need not consider the correctness of the plaintiff's version of the facts . . . All it need determine is a question of law." 472 U.S. at 528. Further, the *Mitchell* opinion notes that the denial of a claim to qualified immunity is immediately appealable "to the extent that it turns on an issue of law." 472 U.S. at 530.

Petitioners seek the right to take an interoluctory appeal of district court decisions concerning the existence of factual disputes that are not appealable in any other context. In the proceedings below, petitioners moved for summary judgment on the grounds that they denied committing the actions alleged in the complaint. Their motion for summary judgment did not rest on the ground that the law was not clearly established, nor any other legal issue associated with qualified immunity. Rather, their motion for summary judgment rested on a claim that the alleged misconduct never occured – a claim that may be presented whenever the defendant denies the plaintiffs' allegations, regardless of whether or not qualified immunity is an issue.

It has long been recognized that where, as here, a district court denies such a summary judgment motion because it finds that material facts are in dispute, that decision is not subject to interlocutory appeal because it is so closely tied to the merits. Petitioners' claim that this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985) created an exception to this rule is misplaced because the legal issues concerning whether the law is "clearly established" under the qualified immunity doctrine are not at issue here. Rather, petitioners' challenge the district court's decision rests solely on the whether the factual record was sufficient to support summary judgment, an issue that is unrelated to the qualified immunity issue that this Court held was subject to appeal in *Mitchell*.

The collateral order doctrine announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) also does not provide appellate jurisdiction for petitioners' appeal because petitioners' claim is so closely tied to the merits. Indeed, petitioners' claim that they are entitled to summary judgment requires that the court determine the merits of their claim that they did not commit the wrongs alleged. Allowing immediate appeals of such decisions would require appellate courts to conduct interlocutory review of factual determinations by the district court that go directly to the merits of the underlying claim. Expanding the collateral order doctrine to permit such appeals would undermine the civil rights laws by expanding the ability of defendants to pursue multiple appeals. It would also burden the appellate courts with interlocutory appeals involving factual issues that are very different from the qualified immunity issue for which this Court authorized an interlocutory appeal in *Mitchell v. Forsyth*.

Petitioners' effort to create a special rule to allow their appeal must be rejected because it would transform the limited right to seek interlocutory review recognized in *Mitchell v. Forsyth* into a right to appeal every denial of a summary judgment motion by a public official who disagrees with the district court's determination that the record is not sufficient to sustain a motion for summary judgment. The expense, delay and use of judicial resources, involved in weighing the sufficiency of the evidence in such appeals will far outstrip any benefit to be gained by allowing such a procedure.

ARGUMENT

A. PETITIONERS' ASSERTION THAT A DEFENDANT WHO DENIES VIOLATING THE LAW AT ALL MAY ASSERT QUALIFIED IMMUNITY AT BEST IS AN INCOMPLETE STATEMENT OF THE APPLICABILITY OF QUALIFIED IMMUNITY OR, IF TAKEN IN ITS BROADEST SENSE, A DEFENDANT WHO DENIES VIOLATING THE LAW IS SIMPLY ASSERTING A DEFENSE OF NO WRONG DOING AND IS NOT COLLATERAL TO THE MERITS AND THEREFORE IS NOT A QUALIFIED IMMUNITY ISSUE AT ALL.

The petitioners have set forth a vague and incomplete proposition in asserting that qualified immunity applies to a defendant who denies violating a law at all. This statement can be viewed in one of two ways. First, a defendant can certainly assert a qualified immunity defense by denying he violated the law *if* the law was not clearly established at the time the alleged violation took place or that the defendant was acting in the shadow of

legal uncertainty. *Mitchell v. Forsyth,* 472 U.S. 511 (1985). Second, if the petitioners' point is that their denial of violating the law at all is premised on the argument that they did not commit the acts alleged, this would not be a qualified immunity defense. This is simply stating a defense of no wrong doing which is not collateral to the merits. *Elliott v. Thomas,* 937 F.2d 338 (7th Cir. 1991).

This Court would agree that a defendant who denies violating the law can assert a qualified immunity defense *if* the law which was allegedly violated was not clearly established or the defendant was acting in the shadow of legal uncertainty. However, it appears that the petitioners have taken this concept well beyond its rationale by mistakenly interpreting a statement in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The petitioners have extracted a statement from *Harlow* where this Court said:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818.

Petitioners have interpreted this to mean that immunity protects a group of defendants who did not violate the law at all either because they did not commit the acts alleged or because those acts are lawful. Nowhere in the *Harlow* decision or holding was there a rule proposed, or even a discussion had, that delineated a grouping of defendants who deny any wrongdoing as falling into a potential qualified immunity category. This Court, in *Harlow,* addressed whether there was a workable procedure

to obtaining the goal of qualified immunity. This Court found that the standard of what needed to be shown was not workable and announced a standard that *eased* the burden placed on public officials asserting this defense by eliminating the necessity of exploring the subjective element of whether the official utilized good faith in carrying out the law as he understood it. *Harlow*, 457 U.S. at 818. Having dismissed this element, the Court held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known. *Harlow*, 457 U.S. at 818. *Harlow* simplified the issue so that a district court did not have to inquire into disputed fact questions in order to determine if a valid qualified immunity defense exists. In this respect, it was added that:

> "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly establish law should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public

> official should know the law governing his conduct."

Harlow, 457 U.S. at 818.

This Court's holding in *Harlow* clearly and unequivocally expresses that there has to be a determination as to whether the law was clearly established at the time of the alleged violation. Nowhere in this holding can it be found that *Harlow* stands for the proposition that a defendant who denies violating the law at all or that he didn't do the acts complained of, may assert this "no wrongdoing" defense under the guise of a qualified immunity assertion. Also entangled in the petitioners' theory that a defendant who denies violating the law at all is entitled to a qualified immunity defense, is their proposition that this would help to alleviate the burdens on defendant officials and society as a whole. They have also cited *Harlow* for this proposition. As discussed above, *Harlow* did not say this at all. *Harlow* did in fact ease the burden on defendants in these cases. The subjective element of the good faith defense frequently had proved to be incompatible with this Court's admonition in that insubstantial claims should not proceed to trial. This, in fact, allowed an easier vehicle for district court judges to have insubstantial and unmeritorious claims thrown out before or during the discovery stage. This Court in *Harlow* never extended the qualified immunity defense as far as the petitioners are suggesting and never did this Court in *Harlow* suggest that a qualified immunity defense should be considered the same as a defense of no wrongdoing as the petitioners suggest.

The petitioners have also proposed that "defendants who deny violating the law at all" are entitled to a

qualified immunity defense collateral to the merits of the case. They have done so by blanketly asserting that courts of appeals have considered the factual backgrounds of other claims in deciding whether a clearly established law has been violated. The fact that a court may have to review the factual background of a particular case in determining whether a qualified immunity defense applies is by no means dispositive as to whether a legitimate qualified immunity defense has been asserted.

As the court in *Elliott* stated "facts do play a role in these types of appeals". *Elliott*, 937 F.2d at 342. It is impossible to know which clearly established rules of law to consult unless you know what is going on. The reason a court of appeals examines the facts is to determine whether it was clearly established at the time that such deeds were forbidden. To say that the reviewing court must, at least in some circumstances, review the facts of a case is not to say that this should also allow a reviewing court in an interlocutory appeal to *decide and rule upon* issues of fact. Therefore, the petitioners are mistaken in their interpretation as to the reason reviewing courts have examined the facts in deciding whether a defendant should be qualifiedly immune for an alleged violation of the law. This Court in *Mitchell v. Forsyth*, with respect to this issue, stated:

> "An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether

> the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly prescribed the actions the defendant claims he took."

Mitchell, 472 U.S. at 528.

One would be extremely strained to find anywhere in this Court's summation in *Mitchell* that qualified immunity concerns are identical to a situation where a defendant has denied violating the law at all. A denial of violating the law without an accompanying assertion that there was uncertainty in the law is simply an "I didn't do it" defense. This is not a qualified immunity assertion; it is simply a defense to the merits.

Petitioners' position that qualified immunity protects those who claim "we didn't violate the law" absent an evaluation of whether the law was clearly established is not supported by this Court's decisions or the majority of circuit court of appeals decisions concerning this issue. It is clear that the issue the petitioners are addressing when they attempt to bootstrap a qualified immunity defense with an assertion of "they didn't violate the law at all", is simply an issue of the innocence or guilt of the defendant. Any defendant can plead innocence or guilt. However, the assertion of innocence or guilt has nothing to do with whether there exists a qualified immunity issue *collateral* to the merits of the case.

B. PETITIONERS POSITION THAT A DEFENSE OF "I DIDN'T DO IT" IS A QUALIFIED IMMUNITY DEFENSE IS ERRONEOUS AND THEIR ADDITIONAL PROPOSITION THAT A DEFENSE OF "I DIDN'T DO IT" MAY BE RAISED ON AN INTERLOCUTORY APPEAL IS NOT CONSISTENT WITH THIS COURT'S DECISIONS ON THIS ISSUE AND WOULD BE CONTRARY TO THE MEANING OF QUALIFIED IMMUNITY, THE COLLATERAL ORDER DOCTRINE ANNOUNCED IN *COHEN*, AND THE FINALITY DOCTRINE.

The petitioners attempt to expand the doctrine of qualified immunity to mean that a defendant who denies violating any law at all may assert qualified immunity and have argued the next step that this type of defense, *i.e.*, "I didn't do it" may be raised on an interlocutory appeal. This argument is unsupported in the law.

Petitioners cite *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), for the proposition that they have a right to an interlocutory appeal under these circumstances under the collateral order doctrine expressed in *Cohen*. In *Cohen*, this Court recognized a "small class" of decisions which finally determined claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. *Cohen*, 337 U.S. at 546. Such orders warrant immediate review despite the final judgment rule which requires that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits. *Flanagan v. United States*, 465 U.S. 259 (1984).

To qualify under *Cohen's* collateral order doctrine, an order must satisfy a three-part test. First, it must conclusively determine the disputed question in the trial court. *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir. 1984). The order cannot be subject to any further proceedings at the trial level either before, during, or after the appeal. Second, it must resolve an important question separable from, and collateral to, the merits of the litigation. *Evans v. Dillahunty*, 711 F.2d 838 (8th Cir. 1983). Finally, the order must be effectively unreviewable on appeal from the final judgment: it must involve a right which would be lost or deprived of its practical value if immediate appeal were not available. *Bever*, 724 F.2d at 1087.

Petitioners' assertion that this doctrine has been satisfied where a defendant cries "I didn't do it" is faulty at a glance at the second requirement of the collateral order doctrine in that the question must be separable from, and collateral to, the merits of the litigation. There is nothing to review collaterally when a cry of "I didn't do it" is at issue because this is nothing more than a defense on the merits claiming innocence. Therefore, petitioners' reliance upon the doctrine announced in *Cohen* is misplaced.

Petitioners also mistakenly assert that the *Cohen* doctrine allows an appeal to a whole category of qualified immunity cases, *i.e.*, not just those that involve a legal question. This is inconsistent with *Cohen's* analysis that there is a very small class of decisions which finally determined claims of rights separable from, and collateral to, the rights asserted in the action. This is why the Seventh Circuit Court of Appeals has held that such an assertion does not involve immunity at all because it is

not collateral to the merits. It is simply a defense of no wrongdoing. As a matter of semantics and misreading of this Court's decisions on this issue, petitioners have attempted to broaden the scope of a qualified immunity defense to the point where a no wrongdoing defense on the merits should be viewed as the same thing as a defense of qualified immunity. Qualified immunity, however, has been consistently held, if in fact it is properly asserted, to be completely collateral to the merits of the case.

It seems that the crux of petitioner's argument is that the circuit courts of appeal should be allowed to review a district court's finding, after a review of the depositions, pleadings and other factual matter contained in the record, that there exists a question of fact as to whether the defendant did the acts alleged. There are several serious problems with this proposition.

First, it is a jury question to decide the ultimate facts which are in dispute. *Alexander v. City and County of San Francisco,* 29 F.3d 1355 (9th Cir. 1994); *Brisk v. City of Miami Beach, Fla.,* 726 F.Supp. 1305 (S.D.Fla. 1989). Also, contrary to the petitioners' assertion, there would be additional appeals that would load the appellate docket in the circuits to an unmanageable and unrealistic level. Allowing interlocutory appeals to determine whether the district court properly determined whether the evidence is sufficient for summary judgment would disrupt the district court litigation and multiply the opportunity for repetitive appeals that burden the appellate courts. Further, if defendants are allowed to take such appeals, they may take more than one appeal. For example, if the district court denies a summary judgment motion and the

court of appeals affirms on the basis that the record is inadequate to support summary judgment, and the defendant then submits additional affidavits, depositions, or other evidence and renews the summary judgment motion on the basis that he or she has caused the deficiencies in the original motion, petitioners' theory suggests that the defendant would be entitled to a second appeal if the renewal motion is also denied. It would also require circuit courts of appeals to look over the shoulder of the district court every step of the litigation which would disrupt its function in quickly resolving these matters and moving them through the court system in an expeditious manner. This case is a perfect example. It is 1995 and the plaintiff has not had his day in court concerning an incident which occurred in 1990 with a lawsuit on file since 1991. It would also lead to an exercise in futility and would perhaps lead to many frivolous appeals as the district court is upheld most of the time. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985).

The question of law contemplated by *Harlow* and *Mitchell* appropriate for an interlocutory appeal where a qualified immunity defense is asserted is whether or not the law that was allegedly violated was clearly established at the time the incident occurred. The issues that this Court held were subject to interlocutory review in *Mitchell* are not only distinct from, but very different from, the issues presented here because the issues presented here are far more fact-intensive and difficult for an appellate court to review. The issue of whether the law is "clearly established" is a legal issue that requires the appellate court to review the district court's reading of the case law, statutes, etc. The issue of whether the record

is sufficient to support summary judgment, on the other hand, requires intimate knowledge of the record to assess whether there are factual disputes concerning material elements of the case. Even if the issue of the sufficiency of the evidence for summary judgment, is, in some respect, a "legal issue," it is an issue that requires a detailed assessment of the factual record that is *not* required to review whether the law was clearly established. Expanding *Mitchell* to cover appeals of defendants' denials of the factual allegations would involve the appellate courts in intense review of the factual record that was never contemplated in *Mitchell.* Never has it been stated that a question of law which should be entertained is whether or not the district court correctly or incorrectly found the existence of a question of fact as to whether the defendants' did or did not perform the acts alleged. A distinct danger of addressing the case on the merits would be readily apparent if an appellate court were allowed to second-guess a district court judge's determination that a question of fact exists as to whether the defendants did the acts alleged. The appellate court would not be as familiar as the district judge with the often complex and voluminous record at summary judgment.

Allowing interlocutory appeals under these circumstances would impose costs on civil rights plaintiffs that undermine the enforcement of the civil right laws. *Harlow* and *Mitchell* emphasize the need to balance plaintiffs' rights against the interest in protecting defendants from frivolous claims but, if defendants are permitted to appeal any adverse determination that may be dispositive, they would be able to thwart the ability of plaintiffs with legitimate claims to get to trial. It would place too

much of a burden on Civil Rights plaintiffs with legitimate claims. This case is a perfect example of a situation where the plaintiff has not had his day in court and it has been almost five years. The Civil Rights Act is intended as a vehicle for citizens to go up against large municipalities and municipal departments when their civil and constitutional rights have been abused. It is a law which is designed to insure that the rights of victims of civil rights abuses are preserved.

Concerns with respect to *Cohen* were addressed in Justice Brennan's dissent in *Mitchell.* Justice Brennan expressed that denials of qualified immunity, at least where they rest on undisputed facts, are generally not appealable. *Mitchell,* 472 U.S. at 543, Brennan J., dissenting, Justice Brennan noted that this Court has always read the *Cohen* collateral order doctrine narrowly, in part because of the strong policy supporting the §1291 Final Judgment Rule. The rule respects the responsibilities of the trial court by enabling it to perform its function without a court of appeals peering over its shoulder every step of the way. It preserves scarce judicial resources that would otherwise be spent in costly and time consuming appeals. *Mitchell,* 472 U.S. at 544, Brennan J., dissenting. Equally important, the final judgment rule removes a potent weapon of harassment and abuse from the hands of litigants. *Mitchell,* 472 U.S. at 544, Brennan J., dissenting. Similarly, where a pre-trial issue is closely related to the merits of a case and interlocutory review is permitted, post-judgment appellate review is likely to require the appellate court to re-examine the same or similar legal issues. This would lead to repetitious appellate review. *Mitchell,* 472 U.S. at 549, Brennan

J., dissenting. Justice Brennan also concluded that even if there were some benefits to be gained by granting officials a right to immediate appeal under these circumstances, such is that in the case at bar, a rule allowing immediate appeal imposes enormous costs on plaintiffs and on the judicial system as a whole. It also imposes costs on the defendant officials and the public. Those who pursue interlocutory appeals can be expected ordinarily to lose. Finally, Justice Brennan observed that if factual determination type of appeals are to be allowed interlocutorily, it would effectively result in the denial of full and speedy justice to those plaintiffs with strong claims on the merits and a relentless and unnecessary increase in the case load of appellate courts. *Mitchell*, 472 U.S. at 556, Brennan J., dissenting.

There is a distinction between saying, "I'm innocent" and "I'm immune." Qualified immunity protects those who acted in the shadow of uncertainty but it does not protect those who merely claim innocence and take issue with the factual claims asserted by the plaintiff which go directly to the merits of the claim. It is true that some courts have accepted that you must review facts to determine if the defendant acted in the shadow of legal uncertainty but this is not the same as what is proposed by the defendant.

The petitioners have also attempted to draw a distinction between saying that a defendant who bases an immunity claim on the law not being established is something different than saying he didn't violate the law. There is no distinction; this is saying the same thing. The circuit courts of appeals, when they decide that a defendant is entitled to qualified immunity, do so because the

law was not clearly established and, therefore, are in effect deciding simultaneously that the defendant did not break the law. No court of appeal has broken this concept into a two-part analysis which the petitioners urge this Court to do. That is, decide if the defendant has broken the law and then decide if the law was clearly established.

Additionally, the petitioners are saying that immunity is conceptually distinct from the merits. This can be true when the law is not clearly established but their argument fails when the immunity defense is based entirely on a denial of the facts. At this point, it really is not an immunity defense at all, it is a defense to the merits guised as an immunity defense.

Along this line, courts have also addressed whether it is actually a question of law to determine if the district court properly found "sufficient evidence" that the defendants committed the alleged violative acts. It should be noted that if this is considered a question of law, it was never the type of question of law that is addressed in deciding if qualified immunity applies to a particular case, *i.e.*, whether the law at issue was clearly established at the time of the alleged acts.

Allowing appellate jurisdiction to decide if there is sufficient evidence to support a plaintiff's claim is asking appeals courts to review purely factual determinations in the course of a qualified immunity interlocutory appeal. This again would be improper because the only question would be whether a district court correctly decided to send a factual issue to the jury. To permit interlocutory

appeals of evidence sufficiency questions will create difficult practical problems. Factual issues in §1983 cases are often complex. Deciding whether the evidence is sufficient to go to the jury in such cases can take many hours of reading depositions, interrogatory answers, and other record material, filled with indeterminate or dubious statements. District courts are often required to sort out complex records to make determinations on summary judgment, and the appellate court should not be required to repeat this review by giving the defendant an appeal as of right. Further, this should be addressed as an issue of sufficiency of the evidence at trial, not sufficiency of the often less comprehensible documentary evidence presented at the summary judgment stage. This Court must recognize the power of the district court to decide, for administrative reasons, the most efficient course of action to take with their assigned matters.

To permit a defendant to appeal an evidence sufficiency issue prior to trial would seriously undermine the district court's case management powers. Also, allow an interlocutory appeal on these grounds would be anomalous to let a defendant force both a district court and an appeals court to pour over a complex record to decide whether the evidence is sufficient to go to a jury. This would not be practical. Additionally, it would be difficult to reconcile this Court's cautions against hastily granting summary judgment if a district court knows that a defendant will immediately appeal, before trial, a decision to send a doubtful case to the jury. In light of these practical considerations this Court meant in *Mitchell* what it said, namely, that a qualified immunity issue is immediately appealable only when it presents a question of law other

than the question whether the evidence was sufficient to raise a jury question about a particular fact. See *Unwin v. Campell,* 863 F.2d 124 (1st Cir.1988), Breyer J., dissenting.

Not only would there be the practical problems previously addressed in this brief if an immediate appeal is allowed every time a qualified immunity defense is raised in the context of a purely factual issue, it would also ask the circuit courts of appeal to create new law in the area as to what constitutes "sufficient evidence" for a case to go to a jury. The appellate court would have to ask the question as to whether one fact, two facts, ten facts, or whether circumstantial evidence alone, is "sufficient evidence" to go to a jury. The appellate court in many or all instances would be required to evaluate which facts they think a jury might find the most compelling. The task would be one never seen in the law before, *i.e.,* the question of what constitutes sufficient evidence to cross a certain threshold for a case to be allowed to go to a jury. This would not be an effective use of the time and resources of our appellate courts.

C. THE COURT OF APPEALS RULE CAN BE MEANINGFULLY APPLIED

The Seventh Circuit's resolution of these issues in the instant opinion is drawn directly from language in *Mitchell v. Forsyth.* The Court's reliance on "legal uncertainty" as the indispensable component of an immunity claim is in harmony with this Court's definition of such claims. In *Siegert v. Gilley,* 500 U.S. 226 (1991), this Court specifically notes:

> "Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suits on its merits. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."

500 U.S. at 232.

In *Elliot v. Thomas*, 937 F.2d 338 (1991), the Seventh Circuit discussed the need to confine interlocutory appeals to cases in which that issue is to be resolved. The Court noted that:

> "Yet the reason a Court of Appeals examines the facts is to determine whether it was clearly established at the time that such deeds were forbidden. Anderson, 483 U.S. at 641. It would extend Mitchell well beyond its rationale to accept an appeal containing nothing but a factual issue."

937 F.2d at 342.

On that basis, the Seventh Circuit has refused to extend an interlocutory appeal to a defense of "we didn't do it." Such an appeal requires resolution of the ultimate issues of fact, something not appropriately done without a trial and final judgment. The Seventh Circuit has not restricted itself to a review of the facts alleged in the Complaint.

In this case, the parties conducted discovery and participated in a completely briefed summary judgment before the Magistrate Judge in the District Court. That Court reviewed the submissions of the parties and described the facts of the occurrence as follows:

> At that point, Heidelmeier decided to place plaintiff under arrest and he forced plaintiff to the ground in order to handcuff him behind his back. Heidelmeier could not accomplish this task alone because of plaintiff's struggling. In the interim, the other individual defendants had arrived on the scene and they assisted Heidelmeier in handcuffing plaintiff and placing him a squad car. Defendants state that due to plaintiff's extreme resistance to their attempts to place him under arrest, it took the efforts of all five officers to control him.
>
> Defendants contend that no one struck, beat or abused plaintiff while in the parking lot where he was arrested. Defendants Johnson, Payne and Deevey add that at that point their involvement in the arrest ended and that they saw no one abuse plaintiff at the police station either. PX D-F. Shortly after Plaintiff arrived at the police station, paramedics were called. Plaintiff spend several days in the hospital for treatment of multiple trauma and broken ribs. DX A at 76; PXF.

The Court's opinion further recognizes the well-established law in the Seventh Circuit that a jury can find a defendant guilty of the excessive use of force if he stood by and watched other officers beat the plaintiff. *Byrd v. Brishke,* 466 F.2d 6 (7th Cir. 1972); (*See also, Rascon v. Hardiman,* 803 F.2d 269 (7th Cir. 1986); *Yang v. Hardin,* 37

F.3d 282 (7th Cir. 1994). Additionally, the Court noted that the plaintiff was able to describe recollections of pain at the time of his arrest.

Thus, the Court identified a specific issue of fact to be determined at trial. If a jury disbelieved the defendant's denials ("we didn't do it"), and determined that plaintiff's injuries resulted from excessive force applied at the time of his arrest, plaintiff could prevail without evidence as to which defendant struck him at a specific point in time. Thus, the District Court determined that an issue of fact remained for trial as to whether the defendants "did it."

On appeal, defendants attempted to block a trial on the basis that qualified immunity should prevent a trial as their claims of "we didn't do it" should be accepted as true. This is exactly what the Seventh Circuit had in mind when it noted that:

> "By slight of hand, you can turn any defense on the merits into a defense of qualified immunity."

937 F.2d at 341.

The expansion of the rule in *Mitchell v. Forsyth* as proposed by these defendants will provide the opportunity for a motion based on qualified immunity and an interlocutory appeal in every case. If "we didn't do it" is acceptable as a basis for immunity to excessive force claims, then the next logical step is to allow defendants to allege they are immune as the force used in a case was reasonable. Under defendant's proposal, literally every claim against an official can be adjudicated on the basis of qualified immunity.

The Seventh Circuit's resolution of this case is workable as demonstrated by the Court's ruling on the issue of arrest without probable cause. The Court reviewed the record and found that as a matter of law, given the uncontradicted facts in the record, the officers had probable cause to arrest the plaintiff, thus, they need not stand trial on the plaintiff's Fourth Amendment claim. This resolution is demonstration enough that the Seventh Circuit's approach to such claims is clearly workable.

It is defendant's proposed expansion of interlocutory appeals that poses potential problems. If an interlocutory appeal is allowed on the basis that qualified immunity is appropriate due to lack of sufficient evidence in Section 1983 cases, it will become even more difficult to litigate such matter as every such case will require extensive discovery on all issues in the case, not just those linked to a determination of immunity.

In order to liquidate the issues involved in "we didn't do it", full discovery will be required. As in this case, when injuries are circumstantial proof of the use of excessive force, even medical discovery, will be required. This will defeat the stated purpose of immunity as a basis to halt discovery and pretrial proceedings and dispose of litigation at an early stage to protect defendants not only from judgment, but also from involvement in litigation.

In defining qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court stated:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the

> resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the current applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct.

457 U.S. at 819.

Nothing in *Harlow v. Fitzgerald* supports the concept that litigation regarding the merits of the case or the ultimate issues involved should be treated similarly to the issue of standard conduct measured by clearly established law.

It is petitioners proposal in this case which will create a rule that cannot be meaningfully applied. It will transform the limited appellate review provided by *Mitchell v. Forsyth* into an appeal of every summary judgment by a public official, who is not satisfied that sufficient evidence exists to require a trial. The expense, delay and use of judicial resources involved in weighing sufficiency of the evidence appeals will far outstrip any benefit to be gained by allowing such a procedure.

As a practical matter, a determination by a district court that an issue of fact as to sufficiency of the evidence

exists is rarely, if ever, overturned on appeal. Summary judgments are appropriate in only a small number of cases; indeed, this Court has cautioned against hastily granting such motions. *Anderson v. Liberty Lobby*, 477 U.S. 272 (1986). It is unlikely that courts of review will be hasty to overturn decisions to deny summary judgment relief. Most importantly, the type of litigation proposed would be completely removed from the separate issue of immunity which are hopelessly entangled with the merits of each case.

Circuit Courts have no problem whatsoever determining if immunity is appropriate under the standard announced by the Seventh Circuit in *Elliott v. Thomas*. In this case, the Court was able to discern the lack of any factual issues regarding probable cause and determine that the petitioners were immune from claims regarding arrest without probable cause.

Elliot v. Thomas was cited with approval by the Third Circuit in *Giuffre v. Bissell*, 31 F.3d 1241 (3rd Cir. 1994). In that case, the Court declined to review a denial of summary judgment to a defendant whose "I didn't do it" defense served only to refute Plaintiff's case-in-chief.

The Seventh Circuit's interpretation of the scope of *Mitchell v. Forsyth* is perfectly appropriate. It is not unworkable and no reason has been put forth to justify expanding the use of interlocutory appeals by in effect redefining qualified immunity.

CONCLUSION

The Seventh Circuit's holding in *Elliott* and in this case, is consistent with the mandate of this Court. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). The holding best serves the interests of judicial economy, the purpose of the Civil Rights Act, and preserves the fair treatment and rights of victims of civil rights abuses. The court of appeals holding in this case also best serves the balancing and fair application of the competing interests of the final judgment rule, the collateral order doctrine, and the purpose of the doctrine of qualified immunity, *i.e.*, the right not to stand trial for actions taken in the shadow of legal uncertainty. Also, as amply demonstrated, the petitioner's argument that the Seventh Circuit's ruling in this matter cannot be meaningfully applied is mistaken. Therefore, the court of appeals' decision in this matter should be affirmed in all respects.

Respectfully submitted,

ANTHONY PINELLI
Attorney at Law
221 North LaSalle Street
Suite 2100
Chicago, Illinois 60601
(312) 641-0590

EDWARD G. PROCTOR, JR.*
SANDMAN, LEVY & PETRICH
134 North LaSalle Street
Suite 1323
Chicago, Illinois 60602
(312) 726-1692

* Counsel of Record

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In the Supreme Court of the United States

OCTOBER TERM, 1994

TYSON JOHNSON, ROBERT DEEVEY, AND
JOHN PAYNE, *Petitioners,*

v.

HOUSTON JONES, *Respondent.*

**On Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit**

REPLY BRIEF FOR PETITIONERS

MARK F. SMOLENS
Flynn, Murphy, Ryan & Seyring
Suite 3232
Chicago, Illinois 60602
(312) 372-3800

CHARLES A. ROTHFELD*
MYLES R. HANSEN
GARY A. ORSECK
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

**Counsel of Record*

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REPLY BRIEF FOR PETITIONERS

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1. Respondent's central contention (at Br. 10-11) is that immunity may be asserted only when the defendant acted in the shadow of unsettled law, and that a defendant's simple denial of liability accordingly cannot implicate the qualified immunity doctrine. But that assertion is plainly wrong. While a defendant certainly may invoke immunity when he violated a constitutional right that was not clearly established at the time, he also may prevail "at an analytically earlier stage *of the inquiry into qualified immunity*" by showing that the plaintiff *altogether* failed to "state a claim for violation of

any rights secured to him under the United States Constitution." *Siegert* v. *Gilley*, 500 U.S. 226, 227 (1991) (emphasis added). The defendant therefore may assert qualified immunity when the plaintiff does not "assert[] a violation of a constitutional right *at all*." *Id.* at 232 (emphasis added).

Against this background, imagine that in this case the *undisputed* facts showed that petitioners used minimal force when taking respondent into custody. Imagine further that petitioners sought judgment on the pleadings on the ground that peacefully arresting a suspect does not violate the Constitution — and that the district court perversely denied the motion. There can be no doubt that, under *Siegert* and decisions like *Hunter* v. *Bryant*, 112 S. Ct. 534 (1991) (discussed at our opening brief at 15-16), petitioners would be entitled to an interlocutory appeal, even though there was no suggestion of legal uncertainty in the case. The reason is apparent: as we explain in our opening brief (at 9-12), the qualified immunity doctrine is designed to spare defendants the burden of defending against insubstantial suits. And a case in which the plaintiff entirely fails to state a claim is as insubstantial as they come.

It is no answer to this point to suggest that "the type of summary judgment order" in the case just hypothesized "is less plainly separate from the merits of the case than was the order in *Mitchell*[v. *Forsyth*, 472 U.S. 511 (1985)]." U.S. Br. 13. It is true that in *Mitchell* the defendant's claim was that, *whether or not* his actions violated the Constitution, the law governing those actions was not clearly settled at the time; that contention was related but not identical to the underlying merits. Similarly, in a case like *Anderson* v. *Creighton*, 483 U.S. 635 (1987), the defendant argues that, *whether or not* his conduct violated the Constitution, a reasonable officer in his position would have believed his actions to be lawful (see *id.* at 641); again, the overlap is substantial but the question is not identical to the merits. In

the case hypothesized above, in contrast, the defendants are sufficiently confident of their case that they omit the "whether or not" aspect of the argument, contending flatly that they did *not* violate the Constitution. For immunity purposes, however, the question is the same: whether the defendant's conduct violated clearly established law — an inquiry that, again, is not identical to the merits. That the court finds *no* violation in the course of answering that question can hardly destroy the right to appeal.

In fact, the distinction suggested by the decision below between cases in which the defendant denies violating the law *at all* and those in which he denies violating *clearly established* law is entirely semantic, for it will always be possible to state a defense like the one hypothesized above in terms that satisfy the court of appeals' requirement. The defendants in the hypothesized case could maintain, for example, that there was some uncertainty in the law of excessive force and that their conduct (wrestling a resisting suspect to the ground to subdue him) — whether or not actually violative of the Constitution — was not clearly illegal. See U.S. Br. 20. Or, stating their contention in terms that evoke *Anderson*, they could assert that, whether or not their conduct violated the law, reasonable officers in their position would not have believed the degree of force used to be excessive. This being so, denying such defendants a right to appeal because it turns out (as in *Siegert*) that they did not violate the law at all would have the perverse result of giving greater protection to officials whose actions might have violated the Constitution than to those whose conduct plainly did not.

2. It likewise is clear, as respondent acknowledges (at Br. 14), that both the district courts and the courts of appeals must resolve factual issues on the way to addressing immunity claims. The Seventh Circuit itself recognizes that "[i]t is impossible to know which 'clearly established' rules of law to consult unless you know what is going on." *Elliott* v.

Thomas, 937 F.2d 338, 342 (7th Cir. 1991), cert. denied, 112 S. Ct. 1242 (1992). Thus, for example, imagine that a plaintiff claims the defendant police officers conducted an improper search because they broke into his house for no reason at all; the defendants respond that exigent circumstances supported the search because they saw a fugitive enter the house. Cf. *Anderson*, 483 U.S. at 637, 641. The district court (applying the proper summary judgment standard under Fed. R. Civ. P. 56) will have to decide which version of facts to assume as true "before [the defendants'] motion for summary judgment on qualified immunity grounds can be resolved." *Anderson*, 483 U.S. at 647 n.6. And if the district court rules for the plaintiff, there is no reason to doubt that the defendant is entitled to an interlocutory appeal in which "the court of appeals may consult the full record." *Elliott*, 937 F.2d at 342.[1] If the

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[1] In reaching the contrary conclusion in *Unwin* v. *Campbell*, 836 F.2d 124, 140 (1st Cir. 1988) (Breyer, J., dissenting), then-Judge Breyer relied principally on "practical considerations," including the concern that review of summary judgment records by the courts of appeals would prove unmanageable. But experience has not borne out this concern. As we note in our opening brief (at 8 n.3), six circuits now review the full summary judgment record in interlocutory immunity appeals; they have not experienced undo difficulty with case management. See page 7, *infra*. To the contrary, this Court recently expressed great skepticism about the suggestion that a distinction should be drawn between "cases in which the determination of * * * immunity is bound up with factual complexities * * * and cases in which it is not." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 687 (1993). It also should be noted that then-Judge Breyer did not endorse the jurisdictional rule adopted by the court below; he "would not say that [the court of appeals] could *never* look at the record to establish the facts * * *. I would say only that we *ordinarily* should not go into questions of 'evidence sufficiency' on an interlocutory appeal, and that the defendant has no legal right to compel us to do so." *Unwin*, 863 F.2d at 140-141 (Breyer, J.,

court of appeals concludes that the district court erred and that there is no genuine issue of material fact regarding the defendant's version of the facts, the appellate court will proceed to address the immunity claim on that basis.[2]

3. With this established, neither respondent nor the court of appeals offers any reason for denying petitioners an appeal in the circumstances of this case. An appeal plainly would lie if there were no factual dispute here and petitioners simply presented the legal assertion that their conduct did not violate clearly established (or any) law. And we have just shown that the courts of appeals routinely resolve factual disputes of the kind in this case as a threshold matter in addressing such legal claims. It thus is unclear why the

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dissenting) (emphasis in original).

[2] Although the question is beside the point for present purposes, we note that respondent is incorrect in suggesting (at Br. 27-28) that petitioners' summary judgment motion was properly denied. In fact, respondent's opposition to the summary judgment motion hangs by the slenderest of evidentiary threads. Respondent recalled feeling pain when he was handcuffed and placed in a squad car, but he did not recall being beaten until after arriving at the police station, by which time petitioners' involvement with him had ended. Pet. App. 5a-6a. Such evidence is insufficient to defeat a summary judgment motion based on the petitioners' sworn testimony that no one struck, beat, or abused respondent at the scene of his arrest. "Even though all reasonable inferences are drawn in favor of the party opposing the motion, a scintilla of evidence in support of the nonmovant's position will not suffice to oppose a motion for summary judgement." *Tolle* v. *Carroll Touch, Inc.*, 23 F.3d 174, 178 (7th Cir. 1994). Respondent's argument rests on speculation, and "[s]peculation does not create a genuine issue of material fact; instead it creates a false issue, the demolition of which is a primary goal of summary judgment." *Hedberg* v. *Indiana Bell Telephone Co., Inc.*, 47 F.3d 928, ___ (7th Cir. 1995).

presence of a factual dispute that bears on the question whether the defendant violated established law should defeat the right to interlocutory appeal.

Certainly, that conclusion is not compelled by anything in either the principle of finality or the qualified immunity doctrine. The addition of a factual dispute does not create a greater overlap with the merits than is present when, as in *Siegert*, the issue is purely one of law; to the contrary, as we explain in our opening brief (at 20-21), the question here (whether there is a genuine issue of material fact) is at a considerably *greater* remove from the ultimate issue of whether the defendant violated the Constitution than was the inquiry in *Siegert*. And while it may be the case, as respondent (at Br. 19-20) and the United States (at Br. 14-15) observe, that the issue here is more "factual" than the one considered on appeal in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), the interests protected by qualified immunity are likely to be *most* substantial in cases involving factual disputes. After all, as we also explain in our opening brief (at 30-31), the burdens of discovery and trial typically are greatest in such cases.

4. Respondent's only answer to this point is his repeated contention that petitioners' defense goes to the merits rather than to immunity. This argument, however, like the analysis used by the court of appeals, rests on an unduly crabbed understanding of qualified immunity. Respondent appears to believe that the only purpose of the doctrine is to protect officials from *ultimate liability* when they engage in conduct that is not understood to be clearly unconstitutional at the time but that is *in fact* illegal. But we explain in our opening brief (at 9-12), and the United States agrees (at Br. 15-16), that respondent's analysis is inconsistent both with the policy of the immunity doctrine and with the Court's articulation of that doctrine. The "driving force behind *Harlow*'s substantial reformulation of qualified-immunity principles" was "that 'insubstantial claims' against

government officials be resolved prior to discovery and on summary judgment if possible." *Anderson*, 483 U.S. at 640 n.2 (citation omitted). Qualified immunity therefore "protects 'all but the plainly incompetent or those who knowingly violate the law'" (*id.* at 638 (citation omitted)), a principle that necessarily applies to defendants who did not violate the law at all.

5. Respondent also is incorrect in contending (at Br. 18-19, 20-21, 23-25, 30) that our approach will lead to a multiplicity of burdensome and insubstantial interlocutory appeals. Experience proves that not to be the case. Five circuits (the First, Fourth, Eighth, Ninth, and Tenth) expressly permit such appeals now, and another (the District of Columbia Circuit) permits them in practice (see our opening brief at 8 n.3); these courts have not seen a flood of meritless appeals.[3]

Significant institutional considerations explain why this is so. Plaintiffs who prevail in § 1983 litigation generally receive their attorneys' fees; meritless appeals serve principally to increase those fees and therefore the defendant's ultimate liability — a powerful disincentive to appeal in such cases. Here, for example, two of the five defendants, recognizing that their situations arguably did present genuine issues of material fact, chose not to pursue interlocutory appeals. And insofar as the defendant's case is financed and managed by his governmental employer, as typically is the case in *Bivens* actions against federal employees, formal policies against frivolous appeals may impose an additional constraint.

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[3] We explain in the petition (at 16-17 & n.6) that the law is either inconsistent or unclear in four other circuits. The Seventh Circuit stands alone in holding unambiguously that it lacks jurisdiction to entertain an "I didn't do it" defense on interlocutory appeal.

Moreover, as the United States explains (at Br. 22-24), the courts of appeals themselves have powerful tools with which to discourage insubstantial appeals. "[A]ppellants or their counsel can be sanctioned for taking a frivolous appeal." *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 720 (10th Cir. 1988). District courts may certify qualified-immunity appeals as frivolous — an approach that already is available in the Seventh Circuit. *Apostol* v. *Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). See U.S. Br. 22-23 (citing additional cases). And the courts of appeals may adopt their own summary procedures to "weed[] out" insubstantial interlocutory appeals. *Richardson* v. *United States*, 468 U.S. 317, 322 (1984). As the United States notes (at Br. 23 & n.13), several courts of appeals also have limited defendants to a single pre-trial immunity appeal; the Court recently granted certiorari to review the propriety of this approach. *Behrens* v. *Pelletier*, No. 94-1244 (cert. granted March 27, 1995).[4]

6. Finally, respondent offers no reply to the demonstration in our opening brief (at 25-31) and in the brief for the United States (at 19-20) that the court of appeals' approach is unmanageable. Respondent argues only (at Br. 29) that the Seventh Circuit's rule must be workable because that court did choose to entertain petitioners' appeal on the

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[4] Two additional points urged by respondent are insubstantial. While respondent maintains (at Br. 25) that courts of appeals have no experience in applying the summary judgment standard, those courts in fact apply that standard routinely in appeals from decisions *granting* summary judgment. And respondent is wrong in contending (at Br. 29) that the rule we propose will not limit discovery because all issues going to liability will have to be explored; in fact, discovery relating to a host of extraneous issues (such as damages, for example) may be precluded pending resolution of the immunity claim. Cf. *Anderson*, 483 U.S. at 647 n.6.

issue of probable cause to arrest. But as we explain in our opening brief (at 16), that aspect of the decision below actually highlights the inconsistencies inherent in the Seventh Circuit's rule because the defense to the false arrest claim, like the one the court declined to consider, involved no assertion of legal uncertainty. Application of the court of appeals' rule therefore would be sure to cause confusion and wasteful litigation as courts struggle to apply an approach that simply is not administrable.

For the foregoing reasons and the reasons stated in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

MARK F. SMOLENS
Flynn, Murphy, Ryan & Seyring
Suite 3232
Chicago, Illinois 60602
(312) 372-3800

CHARLES A. ROTHFELD*
MYLES R. HANSEN
GARY A. ORSECK
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

**Counsel of Record*

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In the Supreme Court of the United States

OCTOBER TERM, 1994

TYSON JOHNSON, ET AL., PETITIONERS

v.

HOUSTON JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

BARBARA L. HERWIG
RICHARD A. OLDERMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether an order denying a summary judgment motion by public officials entitled to qualified immunity may be appealed on the ground that the plaintiff failed to adduce any evidence showing that the defendants acted unconstitutionally.

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INTEREST OF THE UNITED STATES

This case concerns the proper scope of government officials' entitlement, established by *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), to appeal interlocutory orders denying them qualified immunity from suits against them in their individual capacities. Federal employees sued under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), often seek interlocutory review of decisions denying them qualified immunity. The United States has an interest in protecting its employees' abilities to perform their functions free from meritless litigation. The United States also has an interest in ensur-

ing effective deterrence of, and remedies for, unconstitutional conduct by government employees. Both of these interests will be directly affected by the resolution of the issue in this case.

STATEMENT

1. On November 6, 1990, a police officer in Villa Park, a small Illinois town, found respondent hitting his head against the door of a building. Respondent was arrested and, in the arrest process, was seriously injured. After his arrest, respondent spent several days in the hospital for "multiple trauma and several broken ribs." Pet. App. 5a-6a.

The arresting officer, who believed that respondent was intoxicated, asserted that respondent fidgeted with something in his pocket when first questioned by the officer, and then struck the officer when he attempted a pat-down search. The officer claimed that, in order to place respondent under arrest, he had to force him to the ground and handcuff him. Other police officers who had arrived on the scene assisted in the arrest and helped to place respondent in a squad car. Pet. App. 4a, 5a.

Respondent contended that he was a diabetic who, at the time of the arrest, was having an adverse insulin reaction. While insulin shock allegedly prevented him from recalling much of what happened, respondent asserted that the officers used excessive force against him both during his arrest and later at the police station. Pet. App. 6a.

The State charged respondent with disorderly conduct, battery, and resisting arrest. In his defense at his criminal trial, respondent asserted that, due to the insulin reaction, he lacked the required mental state to be convicted of those offenses. The trial judge

found the testimony of the police officers credible in all respects, but nevertheless ordered a judgment of acquittal because the State had failed to make the requisite proof that respondent acted knowingly beyond a reasonable doubt. Pet. App. 6a.

2. Respondent then initiated the present federal court suit against five state police officers, asserting a claim under 42 U.S.C. 1983 for use of excessive force to effectuate the arrest, in violation of the Fourth Amendment, as well as state-law claims of assault and battery, unlawful arrest, false imprisonment and malicious prosecution. Pet. App. 4a-5a.[1] Following discovery, the magistrate judge, presiding with the consent of the parties under 28 U.S.C. 636 (c), denied the officers' motion for summary judgment. Pet. App. 4a-10a.

The court considered the excessive-force and assault-and-battery claims together,[2] and held that factual issues precluded summary judgment on them. Pet. App. 7a-8a. The court acknowledged that substantial evidence existed in favor of the officers on the claims. In the criminal trial against respondent, "the trial court found that [respondent] came into contact [with], struck, and resisted a peace officer." Pet. App. 6a. In addition, in affidavits submitted to support their summary judgment motion, all the officers "testified that no one beat or abused [respondent]." *Ibid.* Respondent's ability to challenge these accounts was severely limited, however, because he "contends that he was experiencing an insulin reaction at the time of his arrest," and, at his criminal trial, he had "testi-

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[1] Four other claims were dismissed at an early stage in the litigation and are not at issue here. Pet. App. 4a.

[2] We refer to these claims as excessive-force claims in the remainder of this brief.

fied that he had no recollection of what transpired from the time he first felt the insulin reaction until he noticed he was being dragged up the stairs of [the] police station." *Ibid.* Respondent's "own doctor testified that he would not rely on anything [respondent] told him about the incident." *Id.* at 7a.

On respondent's side of the ledger, the court found that "the fact of [respondent's] injuries supports an inference of excessive force used." Pet. App. 9a. In addition, respondent denie[d] having resisted the officers' efforts as they say he did." *Id.* at 6a.[3] The court also noted that respondent "testified in the state court to feelings of great pain during the arrest." *Id.* at 7a. The court concluded that "there is sufficient circumstantial evidence supporting [respondent's] theory of the case" to create a jury issue. *Id.* at 8a.

The court then considered the claims of unlawful arrest, false imprisonment, and malicious prosecution,[4] and denied summary judgment on that set of claims as well. Pet. App. 8a-10a. Those claims turned on whether the respondent could establish lack of probable cause for his arrest. *Id.* at 8a. The court observed that, in the officers' view, the probable-cause test was "easily met here," because the respondent's undisputed conduct at the time of the arrest—hitting his head or forehead against the door of a building, while in an apparently intoxicated state, *id.* at 5a

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[3] The court found that respondent's testimony at the criminal trial that he lacked recollection of events during the arrest could "diminish his credibility" regarding those events, but it concluded that "there is no obvious contradiction" and that his testimony could be considered as creditable on summary judgment. Pet. App. 7a.

[4] We refer to these claims as false-arrest claims in the remainder of this brief.

—amounted to a breach of the peace. *Id.* at 9a. The court found that a material dispute of fact precluded summary judgment on those claims, however, because respondent had "presented evidence [through an expert medical witness] that, at the time of his arrest, he may have been weakened by the insulin reaction and unable to summon the level of resistance that defendants claim he did. If obviously weakened, it is conceivable that no reasonable officer might have found cause for arrest." *Ibid.*; see *id.* at 6a. The court added:

> Since there is substantial overlap between the claims of excessive force and lack of probable cause, and because there is at least some possibility [respondent] could prove lack of probable cause, the court will deny summary judgment on the question of probable cause to arrest.

Id. at 9a-10a.

3. The three petitioner officers filed an interlocutory appeal. The Seventh Circuit, in a short, per curiam opinion relying primarily on the opinion of Judge Easterbrook in *Elliott* v. *Thomas*, 937 F.2d 338, 341-343 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992), dismissed the appeal of the excessive-force claim for lack of jurisdiction. Pet. App. 1a-3a.

Elliott held that "a court's refusal to grant summary judgment to a defendant who denies committing any wrong" is not an immediately appealable collateral order under *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). 937 F.2d at 340. The *Elliott* court reasoned that "[a] defense of no wrongdoing is not collateral to the merits; it is the nub of the case." *Ibid.* Quali-

fied immunity "gives public officials the benefit of legal doubt," *id.* at 341, but

> [w]hen rules of law clearly establish public officials' duty, the immunity defense is unavailable. So, too, the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainy; there is no separate "right not to be tried" on the question whether the defendants did the deeds alleged; that is *precisely* the question for trial.

Ibid. The court in *Elliott* acknowledged that, in assessing whether a claim rests on clearly established law, "the court of appeals may consult the full record—viewed, as Fed.R.Civ.P. 56 requires, in the light most favorable to the party opposing the motion for summary judgment." *Id.* at 342. But the *Elliott* court cautioned that "the *reason* a court of appeals examines the facts is to determine whether it was 'clearly established' at the time that such deeds were forbidden. It would extend *Mitchell* well beyond its rationale to accept an appeal containing nothing but a factual issue." *Ibid.* (citation omitted). The argument that the "right not to be tried" requires the court of appeals on interlocutory review to "comb[] through the factual record" was, in the view of the *Elliott* court, "miles away from the position of *Harlow* [v. *Fitzgerald*, 457 U.S. 800 (1982)], *Mitchell*, and *Anderson* [v. *Creighton*, 483 U.S. 635 (1987)]." *Id.* at 341. Acceptance of the view that "a general defense on the merits supports interlocutory appeal" would mean that "every public defendant is entitled to a pretrial appellate decision." *Id.* at 342.

Applying *Elliott* to this case, the court of appeals held that it lacked jurisdiction because petitioners' defense to the excessive-force claims was based, not on

any uncertainty in the law, but on the alleged absence of evidence to support respondent's claims. "A cry of 'we didn't do it' does not present any distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity." Pet. App. 1a-2a. The court additionally stated:

> [Petitioners] do not deny that if they beat [respondent], as he believes they did, then they lack immunity. Whether they beat [respondent] is a question that must be resolved in the district court before it may be reviewed on appeal. When asked at oral argument if they could lose the factual dispute and still prevail, [petitioners'] lawyer answered no. In consequence, we lack appellate jurisdiction over the contention that the [petitioners] did not commit or abet battery.

Id. at 2a.

On the false-arrest claims, however, the court exercised jurisdiction and reversed. It held that the undisputed facts were "that an officer found [respondent], apparently intoxicated, hitting his head against a building, and took him into custody." Pet. App. 2a. Those facts sufficed to "imply disorderly conduct, which supports an arrest." *Ibid.* In the court's view, the magistrate judge had improperly "concluded that because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim also should be tried." *Ibid.* Because "[s]ummary judgment is not a discretionary remedy," but must be granted if the nonmoving party lacks sufficient evidence to permit a jury verdict in his favor, the court of appeals held that judgment should have been granted to the officers. *Id.* at 2a-3a.

SUMMARY OF ARGUMENT

Under the Court's qualified-immunity doctrine, public officials have an entitlement not to stand trial on claims that are insubstantial because they lack factual support. The present case can thus be resolved by application of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), much as the Court applied *Cohen* in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). The same policies of protecting public officials from unnecessary litigation burdens that supported by this Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and *Mitchell* are equally at stake here. The full protection of petitioners' entitlement not to stand trial calls for recognition of their right of interlocutory appeal.

The issue in this case, although closely related to the one resolved in *Mitchell*, is not identical to it. The differences, however, do not mandate a different result. The Seventh Circuit correctly recognized that a typical summary judgment ruling may be less separate from the merits of a case than the question whether a plaintiff's rights were clearly established at the time of the challenged conduct. The issues on summary judgment are nevertheless different from the issues on the merits, however, since summary judgment addresses only whether there is a genuine factual issue for trial, not what the outcome of that trial should be. In addition, whereas *Mitchell* recognized appeals only of issues of law, an appeal of a decision that the plaintiff had proffered sufficient evidence to defeat summary judgment may require a more fact-based appellate review than is required in reviewing many issues of law. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987), makes plain, however, that even review of whether the relevant law was

clearly established—the question at issue in *Mitchell* itself—requires a "fact-specific" inquiry. Appellate review of summary judgment orders like that in this case is no less review of a question of law than the kind of review that *Anderson* involved.

The Seventh Circuit's holding would create a distinction between appeals asserting that the law was not clearly established and appeals based on insufficiency of the evidence. However, as the court of appeals itself recognized in *Elliott* v. *Thomas*, 937 F.2d 338, 341 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992), an evidence-sufficiency question can readily be recharacterized as a question of legal clarity. Under the Seventh Circuit's rule, therefore, the scope of appellate jurisdiction remains effectively undefined and, consequently, extremely difficult to implement with consistency.

Courts can employ various safeguards to ensure that interlocutory appeals in cases such as this one do not unreasonably delay trials on the merits of valid claims against public officials under *Bivens* or Section 1983. Where appropriate, the courts of appeals can make summary dispositions. In addition, some circuits have procedures for the district court to certify to the court of appeals that a qualified-immunity appeal is frivolous, and courts of appeals faced with frivolous appeals have the power to impose sanctions. Several circuits also have rules limiting the number of qualified-immunity appeals in any one case. Management of appellate dockets with procedural mechanisms such as these can minimize the tension between protecting the rights of public officials not to stand trial on factually unsupported claims and permitting plaintiffs with well-founded claims to proceed to trial expeditiously.

ARGUMENT

Mitchell v. *Forsyth*, 472 U.S. 511 (1985), authorizes an interlocutory appeal, under the collateral-order exception to the finality requirement of 28 U.S.C. 1291, from a district court's allegedly erroneous holding that the right asserted by a plaintiff was clearly established. The question in this case is whether a court of appeals similarly has interlocutory appellate jurisdiction over an appeal from an order denying summary judgment where the claim on appeal is not that the relevant law was not clearly established, but that the evidence failed to substantiate the plaintiff's allegations that his clearly established rights were violated. Interlocutory appellate jurisdiction is present in such cases under the logic of *Mitchell*, and such review helps to give full effect to the purpose of qualified immunity to protect public officials from the burdens of trial of insubstantial claims.

I. IN THE QUALIFIED-IMMUNITY CONTEXT, THE INTEREST IN DEFERRING REVIEW OF PRETRIAL ORDERS IS OUTWEIGHED BY THE NEED TO PROTECT THE ENTITLEMENT NOT TO STAND TRIAL ON INSUBSTANTIAL CLAIMS

A. Under *Mitchell* v. *Forsyth*, A Pretrial Decision That The Law Was Clearly Established Is A Collateral Order Appealable On An Interlocutory Basis

The final-judgment rule generally prevents appellate review of interlocutory orders before a case is fully adjudicated.[5] The rule "requires that 'a party

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[5] Section 1291 of Title 28 grants the courts of appeals "jurisdiction of appeals from all final decisions" of the district courts, "except where a direct review may be had in the Supreme Court."

must ordinarily raise all claims of error in a single appeal following final judgment on the merits.'" *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984) (quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981)). The finality requirement serves important interests in the efficient administration of justice. It protects the continuity and coherence of the presentation of claims in the trial courts. *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 430 (1985); *Flanagan*, 465 U.S. at 263-264. It respects the autonomy and discretion of district judges to conduct litigation free from micromanagement by the courts of appeals. See 465 U.S. at 264-265. It prevents costly, time-consuming, piecemeal appeals that delay relief in meritorious cases, and that might prove moot once final judgment is entered. *Flanagan*, 465 U.S. at 264; *Firestone*, 449 U.S. at 374. The final-judgment rule also ensures that appellate review, when it takes place, occurs on a full record, thereby increasing the likelihood of accurate appellate decisions. *DiBella* v. *United States*, 369 U.S. 121, 129 (1962).

The finality rule does not, however, preclude all review of pretrial orders. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), the Court stated that the finality rule should be given a "practical rather than a technical construction." Appeals from particular categories of orders are authorized under *Cohen* where doing so comports with the purposes of the finality requirement. Whether appeal should be allowed in a given set of circumstances requires a balancing of interests: "[I]n deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the order.'"

Gillespie v. *United States Steel Corp.*, 379 U.S. 148, 152-153 (1964) (quoting *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)).

This Court in *Mitchell* recognized that, in the qualified-immunity context, the policy of the finality rule to defer appellate review until the end of a case is sometimes outweighed by the danger that such deferral will unnecessarily subject public officials to trial. *Mitchell* turned on the recognition that qualified immunity has a procedural as well as a substantive component.[6] Qualified immunity is concerned not only with protecting public officials from personal *liability* for claims based on law that is not well established; it also aims to ensure "the dismissal of insubstantial lawsuits *without trial*." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (emphasis added).[7]

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[6] 472 U.S. at 527 (reasoning that "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits" and therefore collateral under *Cohen*); see also *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 114 S. Ct. 1992, 1997 (1994) (referring to "dual rights" under *Mitchell* consisting of both a defense to liability and a right not to stand trial).

[7] See also *Mitchell*, 472 U.S. at 525 (referring to qualified immunity as encompassing the "entitlement not to stand trial under certain circumstances"); *Harlow*, 457 U.S. at 808 ("[In *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978)] we emphasized our expectation that insubstantial suits need not proceed to trial"); *id.* at 813 ("public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial"); *id.* at 814-815 (adjustment of the "good faith" standard is required to ensure "dismissal of insubstantial lawsuits without trial"); *id.* at 818 (standard announced "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment").

Qualified immunity seeks to avoid, wherever possible, "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 816). Thus, to protect the right of a public official not to be tried on a claim of violation of rights dependent on unsettled law, *Mitchell* held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 472 U.S. at 530.

The issue in this case differs from the question resolved in *Mitchell* in two ways. First, the type of summary judgment order at issue here is less plainly separate from the merits of the case than was the order in *Mitchell*. As Judge Kozinski expressed the point in *Velasquez* v. *Senko*, 813 F.2d 1509 (9th Cir. 1987), the defendants' claim in that case that they were not present at the scene of the alleged warrantless INS raids

> is much different from that held to be appealable in *Mitchell*. Nowhere do appellants claim that the law they are accused of violating was not clearly established. Instead, they present a distinct factual issue, inextricably bound up in the underlying claim: whether the defendants were present at the raids and the extent to which they participated in or directed the operations. An ordinary summary judgment motion of this type is not automatically transformed into a qualified immunity claim merely because defendants are federal officials. The appeal does not present a

> purely legal issue, separable from the merits, as *Mitchell* requires.

Id. at 1511. Judge Easterbrook in *Elliott* v. *Thomas*, 937 F.2d 338, 341 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992), similarly pointed out that, although "[b]y sleight of hand you can turn any defense on the merits into a defense of qualified immunity," the question "whether the defendants did the deeds alleged * * * is *precisely* the question for trial." The Seventh Circuit thus held, in this case as in *Elliott*, that an interlocutory appeal is available only to assert that the defendants acted in an area of legal uncertainty, not to assert that they did not act wrongly at all. *Ibid.*

A second way in which this case differs from *Mitchell* is in the nature of the appellate review it seeks. *Mitchell* emphasizes that a denial of qualified immunity is appealable "to the extent that it turns on an issue of law." 472 U.S. at 530; see also *id.* at 528 n.9 ("We emphasize at this point that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law."). As then-Judge Breyer explained in his dissent in *Unwin* v. *Campbell*, 863 F.2d 124 (1st Cir. 1988), however, in a case like the present one "[t]he only 'legal issue' that the district court has decided is the peculiarly fact-bound legal issue of 'evidentiary sufficiency.'" *Id.* at 137. Judge Breyer acknowledged that, "[o]f course, 'sufficiency of the evidence' is a question of law," but reasoned that *Mitchell*'s references to issues of law

> must mean to *distinguish* other, more purely legal questions *from* just this kind of 'evidence-sufficiency' question. The Court's language would

> be meaningless otherwise, since *every* judicial act and *every* appeal involve decision of, or challenge to, a question of law. That is to say, unless the Court is distinguishing fact-based 'evidence-sufficiency' questions from *other* legal questions, it is not making an distinction at all.

Id. at 139.

B. This Case, Like *Mitchell*, Implicates A Qualified-Immunity Right Not To Stand Trial Unnecessarily

Despite the differences between the appellate issue in *Mitchell* and the appellate issue here, interlocutory appeal in the present context is supported by *Mitchell*'s reasoning, and *Cohen* is applicable here as well. That is so because a distinct, procedural immunity right not to be tried unnecessarily is no less at stake when a district court errs in denying a summary judgment motion when the evidence is insufficient than when it errs in concluding that the pertinent law was clearly established. Both situations deal with the denial of the qualified-immunity right to avoid an unnecessary trial. The Seventh Circuit held that there is no such "separate 'right not to be tried' on the question whether the defendants did the deeds alleged," *Elliott*, 937 F.2d at 341. We contend, however, that this Court's qualified-immunity decisions recognize such a right, and that interlocutory review is an appropriate means to protect it.

The Seventh Circuit's view—that the qualified-immunity "entitlement not to stand trial" is limited to circumstances in which the defendant's entitlement to prevail prior to trial rests entirely on the lack of clarity in the law[8]—conceives of qualified immunity

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[8] See *Elliott*, 937 F.2d at 341 ("the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainty").

too narrowly. This Court's decision in *Harlow* "presupposed" a more general entitlement to "the dismissal of *insubstantial lawsuits* without trial." 457 U.S. at 814 (emphasis added). For the reasons *Harlow* sets forth it is, from the perspective of the purposes of the immunity, just as important to protect against trial of claims when their insubstantiality is evidentiary as when they fail because they are based on an unclear state of the law. It would be odd to elevate the procedural protection to which an official is entitled when he acts in an area of legal uncertainty—and does something illegal but not clearly illegal—over the procedural protection to which the official is entitled when he or she simply has done nothing wrong at all.[9]

C. *Cohen* v. *Beneficial Indus. Loan Corp.* Is Applicable In The Present Situation

Under *Mitchell*, the protection of the right not to be tried is collateral to the merits and appealable un-

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[9] The Seventh Circuit's narrow interpretation of the procedural protection afforded by qualified immunity also conflicts with the repeated references in *Harlow* to the entitlement to pretrial dismissal of "insubstantial" suits. See p. 12 & n.7, *supra*. As a literal matter, claims dismissed solely because they depend on law that was not clearly established are not "insubstantial" claims. *Harlow*'s grant of qualified immunity from claims based on unsettled law rests on the assumption that the underlying conduct was unlawful—*i.e.*, that the claim was *not* "insubstantial"—but that, for policy reasons based on the unclear law at the time, the claim should nonetheless not support liability for damages. Cf. *Wyatt* v. *Cole*, 112 S. Ct. 1827, 1836 (1992) (Kennedy, J., concurring) ("To cast the issue in terms of immunity * * * is to imply that a wrong was committed but that it cannot be redressed."). Petitioners' position in this case is that they have a right not to stand trial because no wrong was committed.

der *Cohen*. If there is, as we believe, a qualified-immunity right not to be subjected to trial on factually baseless claims, the *Cohen* test applies here in much the same manner as in *Mitchell*. In order to be appealable under *Cohen*, a trial-court order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) produce a decision that is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); *Flanagan*, 465 U.S. at 265. See *Cohen*, 337 U.S. at 546. The three *Cohen* factors are satisfied here, as in *Mitchell*, by the collateral and final nature of the qualified-immunity right not to be tried on factually insubstantial claims.

First, denial of summary judgment when such a motion is based on factual insubstantiality has the same effect in conclusively determining the disputed question as denial of a claim that the right plaintiff asserts was not clearly established. Such a denial finally and formally rejects the officials' claim to be free from the burdens of trial. As the *Mitchell* Court held, "the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because '[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred,' it is apparent that '*Cohen*'s threshold requirement of a fully consummated decision is satisfied' in such a case." 472 U.S. at 527 (quoting *Abney* v. *United States*, 431 U.S. 651, 659 (1977)).

Second, here, as in *Mitchell*, the right to avoid an unnecessary trial cannot be restored on post-trial appellate review. The aspect of qualified immunity "is an *immunity from suit* rather than a mere de-

fense to liability" is "effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526. The district court's decision as to that issue is thus "effectively unreviewable on appeal from a final judgment." *Id.* at 527.

The third prong of *Cohen* concerns whether the issue sought to be appealed is distinct from the merits of the underlying claim. In one sense, a ruling regarding the sufficiency of the evidence is closely intertwined with the merits, because it addresses the substantive viability of the plaintiff's claim. As Judge Arnold pointed out in *Wright* v. *South Arkansas Regional Health Center, Inc.*, 800 F.2d 199 (8th Cir. 1986), however, an order denying summary judgment may be characterized as separate from the merits, because the issue is not whether defendant in fact committed the challenged acts, "but, rather, whether, when all the facts are viewed in the light most favorable to plaintiff, there is any genuine issue, triable to a jury," on that issue. *Id.* at 203. Summary judgment addresses whether threshold preconditions of trial have been met. It does not seek to make the ultimate determination of what actually occurred. See also *Anderson* v. *Roberts*, 823 F.2d 235, 238 (8th Cir. 1987); *Burgess* v. *Pierce County*, 918 F.2d 104, 106 n.3 (9th Cir. 1990).

The fact that an appellate court must canvass the sufficiency of the evidence in order to decide the appeal in a case like the present one should not result in denial to public officials of the right to take an interlocutory appeal of a decision denying the qualified-immunity right not to stand trial. The courts of appeals routinely consider and adjudicate similar issues on appeals from the grant of motions for summary judgment. In addition, appellate review of pre-

trial orders regarding whether the law is clearly established—review that is concededly available under *Mitchell*—may, in some instances, be equally or even more "fact-bound" than review of a claim of evidentiary insufficiency as straightforward as the one in this case. See, *e.g.*, *Anderson* v. *Creighton*, 483 U.S. 635, 640-641 (1987) (referring to the question whether a reasonable officer could have believed the challenged search was lawful, in light of clearly established law and the information the officers in the case possessed, as "fact-specific"); *Unwin*, 863 F.2d at 132 ("After *Anderson*, a district court is required to examine whether facts gathered through discovery (including facts concerning a defendant's conduct) create a genuine issue of fact regarding the issue of qualified immunity.").

D. The Decision Below Rests On An Impracticable Distinction Between Those Orders That Are Subject To Interlocutory Appeal And Those That Are Not

The Seventh Circuit's rule should also be rejected because it is extremely difficult, and perhaps impossible, to implement with consistency. In many cases there will, in practice, be no meaningful distinction between denials of summary judgment based on whether a right was clearly established and denials based on an insufficiency of evidence. Thus, the court of appeals held in this case that a defendant official cannot appeal on an interlocutory basis to challenge a plaintiff's failure of proof on a claim of a violation of a clearly established right. The only permissible qualified-immunity interlocutary appeal, in the court's view, is one asserting that the right at issue was not clearly established at the time of the challenged

conduct. The former type of appeal can, however, readily be recharacterized as the latter.

For example, the officers' contention in this case was that the district court erred in finding the evidence sufficient to support a claim of excessive force where there was no such evidence. Their appeal could have been framed, however, as a contention that respondent's evidence showed only force commensurate with legitimate law enforcement needs. As such, the appeal would have raised the contention that respondent's claim did not rest on the violation of a clearly established right (since there is no clearly established right to be free from a use of force appropriate to the circumstances). Similarly, the magistrate judge's disposition of the false-arrest claims in this case, over which the court of appeals exercised interlocutory appellate jurisdiction, could have been characterized as an order about sufficiency of the evidence (*i.e.*, as an order that respondent did not present a factual basis for finding that the officers lacked probable cause) and therefore as non-appealable under the Seventh Circuit's rule. Judge Easterbrook made essentially this same observation in *Elliott* when he pointed out that "[b]y sleight of hand you can turn any defense on the merits into a defense of qualified immunity." 937 F.2d at 341. The distinction made by the holding of *Elliott* is unworkable in practice precisely because there is no solution—and the *Elliott* opinion offers none—to the problem of how courts could distinguish "genuine" qualified-immunity appeals from those that result from "sleight-of-hand." [10]

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[10] This Court's decision in *Siegert* v. *Gilley*, 500 U.S. 226 (1991), also supports interlocutory appellate jurisdiction under the circumstances of this case. The Court in *Siegert* held that a plaintiff who has failed to plead a violation of a con-

II. AUTHORIZATION OF APPELLATE JURISDICTION HERE WOULD NOT IMPOSE UNMANAGEABLE BURDENS ON THE COURTS

Experience suggests that recognizing appellate jurisdiction over interlocutory appeals when summary judgment is denied despite the absence of factual support for the plaintiff's claims would not generate an unmanageable number of additional appeals. Several circuits currently allow interlocutory qualified-immunity appeals in such cases.[11] Those circuits do

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stitutional right by a public official has also failed to state a claim of a violation of a clearly established right. The same analysis that *Siegert* thus applied to the allegations of the complaint at the pleading stage can and should also be applied to the evidence at the summary judgment stage: A plaintiff who fails to present evidence supporting a claim of a violation of a constitutional right by a public official has necessarily also failed to present a claim of a violation of a clearly established right by that official. In order to decide whether the plaintiff has presented a violation of a clearly established right, either as a matter of pleading or of proof, the court must know what the challenged conduct is. A question that thus comprises "an analytically earlier stage of the inquiry into qualified immunity," *Siegert*, 500 U.S. at 227—such as whether the allegations (as in *Siegert*) or the evidence supporting them (as here) make out a violation of any right at all—should be subject to the same right of interlocutory appeal. See *Kelly* v. *Bender*, 23 F.3d 1328, 1330 & n.1 (8th Cir. 1994) ("closely related issues of law," the resolution of which "would dispose of the immunity question," are appealable).

[11] See, *e.g.*, *Unwin*, 863 F.2d at 132 ("[Under *Mitchell*], we have jurisdiction to review a district court's denial of qualified immunity on grounds that a genuine issue of material fact exists as to the factual predicate of a qualified immunity claim."); *Kelly*, 23 F.3d at 1330 ("We have jurisdiction over this appeal because, although largely fact-based, it presents the legal question whether [plaintiff] raised a genuine issue

not appear to be overburdened with qualified-immunity appeals. Moreover, interlocutory appeals may also produce counterbalancing efficiencies in the government functions that qualified immunity is intended to protect, and in reducing district court caseloads through prompt appellate review of decisions erroneously allowing cases to remain on the docket.

The courts have various methods for managing appellate caseloads to help ensure that interlocutory appeals will not detract from overall judicial efficiency. For example, rules in several circuits authorize district courts to certify to the court of appeals that a qualified-immunity appeal is frivolous. See, *e.g.*, *Apostol* v. *Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) (Easterbrook, J.) (district court may certify in writing that immunity appeal is frivolous); *Yates* v. *City of Cleveland*, 941 F.2d 444, 448-449 (6th Cir. 1991) (accord); *Stewart* v. *Donges*, 915 F.2d 572,

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of material fact regarding whether the [defendants'] conduct violated his clearly established rights."); *Burgess*, 918 F.2d at 106 n.3 ("on appeal from a denial of summary judgment after discovery the court must consider whether there is a genuine issue of fact as to whether defendant engaged in the conduct violating plaintiff's clearly established constitutional right"); *Wright*, 800 F.2d at 203 (sufficiency of the evidence may be tested on appeal; "[i]f this is a step beyond *Mitchell*, it is a small one, and one fully consistent with the spirit and purpose of the Supreme Court in that opinion. It is important for public officials to be shielded from the burden of trial on insubstantial claims. Their right not to be forced to trial will be lost if an immediate appeal is not allowed."). See also *Febus-Rodriguez* v. *Betancourt-Lebron*, 14 F.3d 87, 90 (1st Cir. 1994) ("we must review the record and examine the discovered facts regarding the conduct of [the defendants], and determine whether a genuine issue does or does not exist concerning qualified immunity"); *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Turner* v. *Dammon*, 848 F.2d 440 (4th Cir. 1988).

576-577 (10th Cir. 1990) (accord); *Chuman* v. *Wright*, 960 F.2d 104, 105 (9th Cir. 1992) (accord). As this Court has pointed out, frivolous interlocutory appeals "may be weeded out by summary procedures." *Richardson* v. *United States*, 468 U.S. 317, 322 (1984).[12]

In order to ameliorate the potential prejudicial delay to persons seeking to vindicate their rights through *Bivens* or Section 1983 suits, courts can also expedite interlocutory appeals. Obvious errors can be promptly corrected by summary reversal. Several circuits also have rules limiting the number of pretrial immunity appeals. The Ninth, Seventh, and First Circuits permit only one such appeal in each case.[13] Other courts permit up to two interlocutory

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[12] See also *DeVargas*, 844 F.2d at 720 ("No doubt some interlocutory appeals of denials of qualified immunity defenses will be frivolous, as when affidavits or depositions in evidence, if believed, clearly support factual claims of violations of established law. That some interlocutory appeals may be frivolous, however, does not affect whether we have jurisdiction. These appellants or their counsel can be sanctioned for taking a frivolous appeal.").

[13] See, *Pelletier* v. *Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 871 (9th Cir. 1992) ("One [qualified immunity] interlocutory appeal is all that a government official is entitled to and all that we will entertain."); *Nelson* v. *Silverman*, 999 F.2d 417, 419 (9th Cir. 1993) (accord); *Abel* v. *Miller*, 904 F.2d 394, 395 (7th Cir. 1990) ("*Mitchell does not* contemplate sequential appeals"); *Kaiter* v. *Boxford*, 836 F.2d 704, 707-708 (11th Cir. 1988) (accord); see also *Velasquez*, 813 F.2d at 1512 (Hall, J., concurring) (finding no jurisdiction over interlocutory appeal because order denied summary judgment without prejudice, and thus did not finally dispose of right not to stand rule). The Ninth Circuit's one-appeal rule is the subject of a pending petition for a writ of certiorari, see *Behrens* v. *Pelletier*, No. 94-1244 (filed Jan. 20, 1995).

qualified-immunity appeals.[14] These various mechanisms can be effectively used to ensure that interlocutory appeals do not unreasonably postpone trial on the merits of valid claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

BARBARA L. HERWIG
RICHARD A. OLDERMAN
Attorneys

FEBRUARY 1995

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[14] See *Kulwicki* v. *Dawson*, 969 F.2d 1454, 1460 n.5 (3d Cir. 1992) (stating that *Mitchell* permits appeal at "either or both" the motion to dismiss or the summary judgment stage); *Sinclair* v. *Schriber*, 834 F.2d 103, 104-105 (6th Cir. 1987) (*Bivens* defendant has "two bites out of the appellate apple, at the pleading and at the discovery stage").

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No. 94-455

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TYSON JOHNSON, ROBERT DEEVEY, AND JOHN PAYNE,
Petitioners,

v.

HOUSTON JONES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND THE U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

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QUESTION PRESENTED

Whether, in an action under 42 U.S.C. § 1983, the denial of a public official's motion seeking summary judgment on qualified immunity grounds because the plaintiff failed to adduce any evidence showing wrongful conduct may be challenged in an interlocutory appeal.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The doctrine of qualified immunity is designed to enable state and local public officials to perform their duties by protecting them from the disruption and expense of trial, as

well as from liability for damages, where their actions do not violate clearly established law. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Indeed, the Court has emphasized that an essential component of qualified immunity is the right not to stand trial in insubstantial cases. *See id.* Because that right is important to the functioning of state and local government, *amici* have a manifest interest in its protection.

Because the right to avoid trial is irretrievably lost if a trial court fails to grant summary judgment on qualified immunity grounds, the Court has recognized the necessity of permitting interlocutory appeals on the qualified immunity issue. The court of appeals' holding eviscerates that protection by forbidding appeals from the denial of summary judgment where the reason advanced for qualified immunity is the fact that no evidence exists that the public official did anything at all that would constitute a violation of the plaintiff's rights. Because such a distinction dramatically reduces a core protection of qualified immunity—the right not to stand trial in insubstantial cases—it is of significant concern to *amici*.

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt petitioners' statement of the case.

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. The qualified immunity doctrine reflects the reality that "damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The doctrine thus protects public officials when their actions do not violate clearly established law. It encompasses not only actions undertaken where the law is uncertain, but also actions which plainly violate no law. By providing a zone within which public officials may act without fear of litigation, qualified immunity reduces the risks that might otherwise inhibit public officials and prevent them from effectively carrying out their duties.

Qualified immunity protects public officials not only from liability for money damages, but also from "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (citation omitted). It is thus an entitlement to "*immunity from suit* rather than a mere defense to liability." *Id.* Accordingly, its protections require "[i]nsubstantial lawsuits [to] be quickly terminated." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (citations omitted). The Court has recognized that the public official's entitlement to timely termination of insubstantial lawsuits can only be made meaningful if an interlocutory appeal is available where the trial court errs in denying qualified immunity.

2. This Court has held "that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell*, 472 U.S. at 530. Such a denial satisfies all three criteria of the collateral order doctrine: it is essentially unreviewable after

final judgment; it conclusively disposes of a public official's right not to stand trial; and it involves rights conceptually distinct from, and collateral to, the rights asserted by the plaintiff. *Id.* at 526-29.

Permitting interlocutory appeal of a denial of qualified immunity based on an erroneous legal assessment of the sufficiency of the evidence clearly falls within *Mitchell*'s "spirit and purpose." *Wright v. South Arkansas Regional Health Center, Inc.*, 800 F.2d 199, 203 (8th Cir. 1986). Nothing in *Mitchell* supports the view that a distinction must be drawn, for purposes of interlocutory appeal, between the different varieties of legal error that might be responsible for a denial of qualified immunity.

Even if *Mitchell* does not conclusively address the appealability of an erroneous denial of qualified immunity on the grounds presented here, it is clear that such a denial falls within the collateral order doctrine. Because a public official's immunity from suit "is effectively lost if a case is erroneously permitted to go to trial," *Mitchell*, 472 U.S. at 526, a denial of qualified immunity at the summary judgment stage is unreviewable after final judgment, whether that denial is premised on a legal issue involving sufficiency of the evidence or one involving the clarity of the law. Relatedly, a denial of qualified immunity at the summary judgment stage "finally and conclusively determines the defendant's claim of right not to *stand trial*," *id.* at 527, regardless of the legal basis for that denial.

Finally, an appeal from a denial of qualified immunity on the legal ground at issue here "involve[s] a 'clai[m] of right separable from, and collateral to, rights asserted in the action.'" *Id.* at 527 (citation omitted). "[I]t follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28.

This conceptual distinctness is retained despite the fact that an examination of the factual record may be required to decide the qualified immunity issue, and despite the fact that the public official's appeal, if successful, will simultaneously determine the outcome of the case and dispose of the plaintiff's claim on the merits. *See id.* at 528-29; *Siegert v. Gilley*, 500 U.S. 226 (1991).

3. To make the appealability of a denial of qualified immunity turn on the type of legal error responsible for the denial would produce incongruous results and generate confusion and uncertainty among public officials. Instead of extending comprehensive protection from litigation and trial to all who stay within the bounds of clearly established law, such a view would withhold an important element of a public official's immunity from suit from those whose actions are on firm legal ground. The heightened risk that public officials who have done nothing wrong will nonetheless be forced to litigate insubstantial claims would be costly not only to the public officials involved, but to society as a whole.

ARGUMENT

THE DENIAL OF A PUBLIC OFFICIAL'S SUMMARY JUDGMENT MOTION ASSERTING QUALIFIED IMMUNITY MAY BE THE SUBJECT OF INTERLOCUTORY APPEAL ON THE GROUND THAT THE TRIAL COURT COMMITTED LEGAL ERROR IN CONCLUDING THAT A GENUINE ISSUE OF MATERIAL FACT WAS PRESENTED

A. Qualified Immunity Entitles A Public Official To Avoid Litigating Insubstantial Lawsuits

Qualified immunity is a judicially created response to the tension between the need for meaningful redress "[w]hen government officials abuse their offices," and the countervailing reality that "damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability will un-

duly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). As the Court explained in *Anderson v. Creighton*, "[o]ur cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Id.* (citations omitted). Qualified immunity protects public officials not only from liability for damages, but also from the risks and burdens of litigation and trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

1. *Qualified Immunity Protects Public Officials Who Act Within Clearly Established Legal Boundaries, As Well As Those Who Act Where The Law Is Unclear*

The doctrine of qualified immunity provides comprehensive protection to public officials who do not violate clearly established law. "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). An official, therefore, "is immune unless his actions violated clearly established law." *Mitchell*, 472 U.S. at 530 (citations omitted).[2] Qualified immunity protects not only the public official who acts in the face of unclear law, but also the public official whose actions are fully con-

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[2] *See also id.* at 528 (public officials immune unless "the law clearly proscribed [their] actions"); *Anderson v. Creighton*, 483 U.S. at 646 ("officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law"); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

sistent with the law. *See Siegert* v. *Gilley*, 500 U.S. 226, 231-33 (1991) (where no violation of constitutional right is asserted, defendant is entitled to summary judgment on qualified immunity grounds). Petitioners' defense that they did not violate respondent's constitutional rights is thus squarely within the scope of the qualified immunity doctrine.

This broad protection flows logically from the purposes of qualified immunity: "The conception animating the qualified immunity doctrine . . . is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."' " *Mitchell*, 472 U.S. at 525 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). As the Court recently reiterated, "[t]he central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.' " *Elder v. Holloway*, 114 S.Ct. 1019, 1022 (1994) (quoting *Harlow*, 457 U.S. at 806). The purposes of qualified immunity mirror those given by the Court for affording certain officials absolute immunity:

> The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Barr v. Matteo, 360 U.S. 564, 571 (1959).

Qualified immunity, therefore, provides a zone of conduct within which a public official may freely act without

fear of liability or the burdens, risks, costs, and distractions of trial—a zone which encompasses not only those areas in which the law is unclear, but also those areas which fall well within the bounds of clearly established law. A public official who stays within the zone of conduct delineated by the doctrine of qualified immunity is entitled to all of the benefits of qualified immunity, including protection from standing trial on insubstantial claims.

The need to afford public officials such a protected zone of action is apparent: "one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public. . . . Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices." *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974) (footnote omitted). Where officials are not protected, there is a cost "not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814 & n.22 (citing Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281, 324-27 (1980)). Public officials may undertake actions which minimize the chance of being sued but which are not the optimal ones, from the perspective of the public interest. *See Turner v. Dammon*, 848 F.2d 440, 444 (4th Cir. 1988); *see generally* Schuck, *Suing Our Servants*, 1980 S. Ct. Rev. 281.[3]

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[3] The incentive to engage in self-protective behavior may be particularly strong for local police officers—described by the Court as "that segment of the executive branch of a state government that is most frequently and intimately involved in day-to-day contacts with the citizenry and, hence, most frequently exposed to situations which can give rise to claims under § 1983." *Scheuer*, 416 U.S. at 244.

The clearest example of such "self-protective" behavior is inaction—such as the decision to ignore or walk away from suspicious behavior or an incident that is unfolding. *See* Schuck, *Suing Our Servants*, 1980 S.Ct. Rev. at 309. Interacting with members of the public, even where one's conduct unambiguously falls within well-established legal boundaries, entails some risk of a frivolous lawsuit based on that interaction, whereas (at least in certain discretionary settings) walking away poses virtually no risk of liability or reprisals. *See id.*; *see also Turner*, 848 F.2d at 444 ("the person aggrieved by official actions may be quite willing to sue, but the losses to society as a whole that come from official inaction may be more diffuse and thus less likely to result in a lawsuit").[4] Qualified immunity is designed to eliminate the incentive for self-protective behavior by providing comprehensive protection against frivolous lawsuits to public officials who stay within the bounds of clearly established law.

2. *Central To The Protection Afforded By Qualified Immunity Is An Entitlement To Termination Of Insubstantial Lawsuits At The Earliest Possible Stage Of The Litigation*

Qualified immunity, as formulated by the Court, protects public officials' freedom to act by shielding them from the consequences of actions which do not violate

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[4] The social costs associated with such self-protective behavior are significant. While society as a whole suffers, Professor Schuck has identified "silent victims" who bear the brunt of these social costs:

> [T]he silent victims I describe are individuals who must rely heavily upon street-level public services to assure their safety and well-being; they are almost certainly disproportionately poor and dependent. They are precisely the persons who can least afford to bear the costs of official self-protection, who are least likely to seek remedies, and whom a just society would least wish to burden.

Suing Our Servants, 1980 S.Ct. Rev. at 314.

clearly established law. *See, e.g., Mitchell*, 472 U.S. at 525; *Harlow*, 457 U.S. at 819. The "consequences" from which officials are protected, the Court has clarified, "are not limited to liability for money damages; they also include 'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.' " *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 816). Thus, "[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert*, 500 U.S. at 232. Qualified immunity is an "entitlement [to] an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526.

This protection from litigation as well as from liability is designed to avoid the considerable social costs that are incurred when public officials are forced to litigate insubstantial claims:

> [C]laims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

Harlow, 457 U.S. at 814 (footnote and citation omitted). As the *Harlow* Court further explained, "[i]nsubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure." *Id.* at 819 n.35.

It was the Court's appreciation of these costs—the social and financial toll associated with requiring public officials to stand trial—that led it in *Harlow* to "refashion[] the qualified immunity doctrine in such a way as to 'permit the resolution of many insubstantial claims on summary judgment.'" *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 818). Because it appeared to the *Harlow* Court that the qualified immunity standard, as it was then formulated, stood in the way of the timely dismissal of insubstantial lawsuits, the Court adjusted the operative standard so that such early termination would be routinely available to public officials. *See Harlow*, 457 U.S. at 813-19.

As the Court explained in *Harlow*, "[i]n identifying qualified immunity as the best attainable accommodation of competing values . . . we relied on the assumption that this standard would permit '[i]nsubstantial lawsuits [to] be quickly terminated.'" 457 U.S. at 814 (citations omitted). Indeed, the *Harlow* Court described "the dismissal of insubstantial lawsuits without trial" as "a factor presupposed in the balance of competing interests struck by [its] prior cases." *Id.* In *Butz v. Economou*, the Court assumed that public officials would be able to quickly dispense with frivolous claims:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity.

438 U.S. 478, 508-09 (1978) (footnote and citation omitted); *see Harlow*, 457 U.S. at 819 n.35 (reiterating admonition in *Butz* "that 'insubstantial' suits against high public officials should not be allowed to proceed to trial").

In *Mitchell*, the Court identified two situations in which qualified immunity should entitle the defendant to quick termination of the litigation: First, "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." 472 U.S. at 526; *see also Harlow*, 457 U.S. at 818. Second, "[e]ven if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover sufficient evidence to create a genuine issue as to whether the defendant in fact committed those acts." *Mitchell*, 472 U.S. at 526.

The *Mitchell* Court went on to elaborate on this entitlement in the context of the first situation described—where the allegations fail to state a violation of clearly established law:

> *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell, 472 U.S. at 526 (emphasis in original). In such a case, qualified immunity shields the public official not only from trial, but also from discovery. To make this entitlement to expeditious termination of the litigation meaningful, interlocutory appeal must be available when a trial court erroneously denies qualified immunity in this context. *See id.* at 526-27.

The protections of qualified immunity should be equally available in the second situation set forth in *Mitchell*—where, despite the adequacy of the plaintiff's allegations, "discovery fails to uncover evidence sufficient to create

a genuine issue as to whether the defendant in fact committed those acts" and "the defendant is entitled to summary judgment." *Mitchell*, 472 U.S. at 526. While the public official in such a situation may not be able to avoid some measure of limited discovery, the purposes of qualified immunity require that the public official be protected from the further burdens of litigation and trial when limited discovery fails to yield sufficient evidence of wrongdoing.[5] Just as "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery," *Harlow*, 457 U.S. at 817-18, neither should a bare allegation of wrongdoing, unsupported by evidence that creates a genuine issue of disputed fact, suffice to subject a public official to such burdens. *See* 2 *Civil Actions Against State and Local Government* § 11.47, at 198 (Shepard's/McGraw-Hill) (2d ed. 1992).

In this situation, as in the first one set forth by the *Mitchell* Court, qualified immunity should protect public officials from the burden and expense of litigating insubstantial claims by requiring termination of the litigation at the earliest stage possible, consistent with providing the plaintiff an opportunity to present any relevant facts.

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[5] Pursuant to Rule 56(f), a party facing a summary judgment motion may request a continuance to conduct limited discovery to oppose the motion. *See* Fed. Rules Civ. Proc. 56(f). Whether or not discovery is available, of course, depends upon whether the plaintiff has satisfied the threshold pleading requirement. *See, e.g., Hobson v. Wilson*, 737 F.2d 1, 29-31 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Any such discovery must also be carefully limited. *See Anderson v. Creighton*, 483 U.S. at 646 n.6 (while "discovery may be necessary before Anderson's motion for summary judgment on qualified immunity can be resolved[,] . . . any such discovery should be tailored specifically to the question of Anderson's qualified immunity"). Moreover, the Court has emphasized that, "[i]n responding to [a summary judgment] motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz*, 438 U.S. at 508.

Accordingly, a public official faced with an erroneous denial of qualified immunity in this context should be permitted an interlocutory appeal to preserve his or her immunity from suit. As *amici* explain below, such a result is entirely consistent with the collateral order doctrine.

B. The Denial Of A Public Official's Entitlement Not To Stand Trial Is Immediately Appealable Pursuant To The Collateral Order Doctrine, Regardless Of The Specific Legal Issue Upon Which That Denial Turns

1. *A Denial Of Qualified Immunity Premised On A Determination That A Genuine Issue Of Fact Exists Is An Appealable Final Decision Under The Reasoning In* Mitchell

While 28 U.S.C. § 1291 broadly limits appellate jurisdiction to final decisions by district courts, the collateral order doctrine recognizes that certain decisions which do not terminate the litigation on the merits may nevertheless have special characteristics and consequences which require that they be treated as "final decisions" for purposes of permitting immediate appeal. In *Cohen v. Beneficial Industrial Loan Corp.*, the Court described the scope of the collateral order doctrine as encompassing

> that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

337 U.S. 541, 546 (1949); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

In *Mitchell*, the Court held "that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 472 U.S. at 530. The Court observed that the protection qualified immunity pro-

vides from litigation and trial would be irreparably lost if an erroneous denial of such immunity could not be immediately appealed. *See id.* at 526-27.[6] Applying the three-prong *Cohen* test, the *Mitchell* Court held that a denial of qualified immunity at the summary judgment stage is essentially unreviewable after final judgment, since a critical component of that immunity is the right not to stand trial; that such a denial conclusively disposes of a public official's right not to stand trial; and that the qualified immunity inquiry is conceptually distinct from, and collateral to, the merits of the case. *See* 472 U.S. at 526-29.

Whether a plaintiff has presented sufficient evidence to create a genuine factual issue is a question of law, albeit a question of law that turns on a preliminary assessment of the factual record. *See Wright v. South Arkansas Reg. Health Ctr., Inc.*, 800 F.2d 199, 203 (8th Cir. 1986).[7]

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[6] In this respect, qualified immunity is directly analogous to other protections against standing trial, the denial of which have been held to be immediately appealable. *See Abney v. United States*, 431 U.S. 651, 661-62 (1977) (double jeopardy clause protects individuals from "the personal strain, public embarrassment, and expense" of a second trial, and "these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken"); *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)) (claim that an indictment violates the Speech or Debate Clause is directly appealable, because "the Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves' ").

[7] Detailed weighing of the facts is not necessary to decide the legal issue: "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In making this determination, "[t]here is no requirement that the trial judge make findings of fact." *Id.* at 250 (footnote omitted). Instead, "the inquiry performed is the threshold inquiry of determining whether there is the need for trial—whether, in

Because the Court in *Mitchell* held, without qualification, that a denial of qualified immunity is immediately appealable "to the extent it turns on an issue of law," 472 U.S. at 530, a denial of qualified immunity based on an erroneous legal assessment of the sufficiency of the evidence would appear to fall within the literal scope of the *Mitchell* Court's holding, as well as within its "spirit and purpose." *Wright*, 800 F.2d at 203.

The court of appeals assumed, however, that a distinction must be drawn, for purposes of interlocutory appeal, between denials of claims of qualified immunity which turn on legal questions involving the clarity of the law, and those which turn on whether the evidence presented by the plaintiff is legally sufficient to withstand a summary judgment motion. *See* Pet. App. 1a-2a. In other words, an appeal may be taken to preserve a public official's right not to stand trial when the trial court makes one type of legal error in denying qualified immunity, but not when the trial court makes a different type of legal error in denying the qualified immunity claim. An analysis of *Mitchell*, however, fails to support such a distinction between types of legal errors.

Mitchell identifies two types of legal errors that can result in denial of qualified immunity at the summary judgment stage. First, the trial court might erroneously conclude "that even if the facts are as asserted by the defendant, the defendant's actions violated clearly established law and are therefore not within the scope of the qualified immunity." *Mitchell*, 472 U.S. at 527. A chal-

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other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* The inquiry at the appellate level is similarly limited. *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 719 (10th Cir. 1988) ("Our task in such an appeal is not to determine liability on a battle of affidavits, but to determine whether, on the basis of the pretrial record, there exists a conflict sufficiently material to defendants' claim of immunity to require them to stand trial.").

lenge to this legal conclusion would take the form of demonstrating that the law was *not* clearly established with respect to the actions the defendant alleges he took.

Second, the trial court might erroneously deny summary judgment upon concluding that "if the facts are as asserted by the plaintiff, the defendant is not immune." *Id.* There are two separate reasons why this denial might be erroneous. First, the trial court could simply be wrong in its assessment of the law; the defendant might be able to show that even if the plaintiff's assertions were true, they do not state a violation of clearly established law. *See id.* at 528; *Siegert,* 500 U.S. at 232-33.

Alternatively, as was the case here, the trial court might be correct in stating that "if the facts are as asserted by the plaintiff, the defendant is not immune," *Mitchell,* 472 U.S. at 528, but might nevertheless erroneously deny summary judgment where there is insufficient evidence to support the plaintiff's version of the facts. This is the situation mentioned earlier by the *Mitchell* Court—where "the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law," but "discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.' *Mitchell,* 472 U.S. at 526. In this case as well, the Court makes clear, "the defendant is entitled to summary judgment." *Id.*

This express recognition by the Court of a public official's entitlement to summary judgment in such a situation, coupled with the Court's insistence in *Harlow* on termination of insubstantial lawsuits at the earliest possible stage of the litigation, strongly suggests that legal errors falling into this category should be immediately appealable.[8]

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[8] The *Mitchell* Court's discussion of the "collateral" nature of the qualified immunity inquiry focused on legal errors involving the clarity of the law, rather than legal errors as to the sufficiency

2. *A Denial Of Qualified Immunity Based On The Determination That A Genuine Issue Of Fact Exists Satisfies The* Cohen *Criteria*

Even if *Mitchell* does not conclusively address the appealability of a denial of qualified immunity on the grounds presented here, an examination of the *Cohen* criteria provides the answer. *See Cohen*, 337 U.S. at 546; *Coopers & Lybrand*, 437 U.S. at 463. Like a denial of qualified immunity which turns on the clarity of the law, a denial of qualified immunity which turns on a legal error as to the sufficiency of the evidence is unreviewable on appeal from a final judgment, conclusively determines the public official's right not to stand trial, and involves a right separable from and collateral to the rights asserted in the action.

Unreviewable On Appeal From Final Judgment. As discussed above, a core component of qualified immunity is the public official's entitlement not to stand trial on insubstantial claims. The denial of a motion for dismissal or summary judgment on qualified immunity grounds amounts to a denial of this entitlement, which is unreviewable on appeal from a final decision. Once the public official is required to stand trial, his right to avoid standing trial is lost forever. As the Court explained in *Mitchell*, "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526. *See also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 687-89 (1993). Significantly, the trial court's denial of the "entitlement not to stand trial" component of qualified immunity is just as unreviewable after trial where that denial turns on the sufficiency of the evidence, as where it turns on the clarity of the law. *Cf.*

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of the evidence. *See Mitchell*, 472 U.S. at 527-28. However, as *amici* discuss below, *see* pp. 20-23, *infra*, similar analysis applies to the latter type of legal error.

Unwin v. Campbell, 863 F.2d 124, 132-33 (1st Cir. 1988).

Conclusively Determines The Disputed Question. Another criterion for interlocutory appeal is that the trial court's decision "must 'conclusively determine the disputed question.' " *Mitchell*, 472 U.S. at 527 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Here, the question of whether the public official will be required to stand trial or will be immunized from standing trial is conclusively determined by the trial court's denial of summary judgment. As in other situations in which interlocutory appeal has been permitted, no further steps can be taken by the public official to avoid being required to stand trial. *See Abney v. United States*, 431 U.S. 651, 659 (1977) (where double jeopardy claim is rejected "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee"); *Helstoski v. Meanor*, 442 U.S. 500, 507 (1979) ("[o]nce a motion to dismiss [on Speech or Debate Clause grounds] is denied, there is nothing the Member can do under that Clause in the trial court to prevent the trial").

It is obviously irrelevant that the trial court might change its mind about the availability of qualified immunity after a full trial. In *Mitchell*, the Court considered just such a situation, in which the trial court's erroneous holding as to the availability of qualified immunity at the summary judgment stage might later be corrected at trial:

> Even so, the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred," it is apparent that "*Cohen*'s threshold requirement of a fully consummated decision is satisfied" in such a case.

472 U.S. at 527 (quoting *Abney*, 431 U.S. at 659).[9]

Involves A Right Separable From, And Collateral To, Those Asserted In The Action. Finally, the question decided by the trial court "must involve a 'clai[m] of right separable from, and collateral to, rights asserted in the action.' " *Mitchell*, 472 U.S. at 527 (quoting *Cohen*, 337 U.S. at 546)). As the Court noted in *Mitchell*, "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." 472 U.S. at 527-28. This conceptual distinctness arises out of the fact that the immunity question is focused on deciding the immediate consequences for the public official—whether he or she will be subjected to the further burdens of discovery and trial. The question whether or not the public official is entitled to a quick termination of the lawsuit involves the public official's right to qualified immunity, a right that is plainly separable from and collateral to the rights asserted by the plaintiff.

Nor does the relevance of the factual record to the legal question at issue blur the conceptual distinction between the public official's asserted right to avoid trial and the plaintiff's asserted right to relief. The factual record will always bear upon the resolution of qualified immunity issues, even where the qualified immunity issue turns on a legal question involving the clarity of the law.[10] As the Court observed in *Mitchell*,

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[9] *Cf. Abney*, 431 U.S. at 660-61 ("[T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense.") (footnote omitted).

[10] For example, in *Anderson v. Creighton*, the Court explained that "the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable

> the resolution of . . . legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief; the same is true, however, when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause. . . . In holding these and similar issues of absolute immunity to be appealable under the collateral order doctrine, the Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue.

Mitchell, 472 U.S. at 528-29 (citations and footnote omitted).[11] It is quite clear from the *Mitchell* Court's treatment of the "separable and collateral" prong of the *Cohen* test, therefore, that a legal issue need not be totally unrelated to, or hermetically sealed from, the "facts" or the "merits" of the case in order to fall within the collateral order doctrine.

Likewise, the fact that an appellate court's decision as to the qualified immunity issue may decide the outcome of the case—or may, indeed, simultaneously decide the "merits" of the case—does not make the qualified immunity determination any less "collateral" under *Cohen*. Any successful appeal by a public official based on qualified immunity will be outcome determinative, whether the

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cause or exigent circumstances"—in other words, whether qualified immunity is available—"will often require examination of the information possessed by the searching officials." 482 U.S. at 641.

[11] *See also Puerto Rico Aqueduct & Sewer Auth.*, 113 S.Ct. at 689 (rejecting proposed distinction, for purposes of interlocutory appeal, between "cases in which the determination of a State or state agency's claim to Eleventh Amendment immunity is bound up with factual complexities whose resolution requires trial and cases in which it is not") (citing *Mitchell*, 472 U.S. at 527-29 & n.10).

initial denial of qualified immunity was based on a legal error as to the clarity of the law or a legal error as to the sufficiency of the evidence. In either case, the resolution of the defendant's entitlement to qualified immunity simultaneously disposes of the plaintiff's asserted right to relief.[12] Yet the Court has nevertheless considered the qualified immunity issue to be "collateral," based on the fact that its adjudication determines the public official's right not to stand trial—a right separable from, and collateral to, the rights asserted by the plaintiff. *See Mitchell*, 472 U.S. at 527-29.

This is true even where the basis for deciding the qualified immunity question bears unmistakably on the validity of the plaintiff's claim of right. In *Siegert*, the Court expressly addressed a situation in which the plaintiff "failed not only to allege the violation of a constitutional right that was clearly established at the time of [the public official's] actions, but he failed to establish the violation of any constitutional right at all." 500 U.S. at 233. There, the Court emphasized that the question whether the plaintiff had alleged a violation of a constitutional right must be resolved before discovery to preserve the public official's entitlement to avoid the burdens of litigation. *See id.* at 232.

The legal determination that the plaintiff has failed to allege a violation of a constitutional right could hardly bear more directly on the "merits" of the plaintiff's case. Such a determination is not only outcome determinative in a practical sense (i.e., the plaintiff loses), it also means that, as a matter of law, the plaintiff's claim had no legal

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[12] Of course, an unsuccessful appeal by a public official on qualified immunity grounds would not determine the merits or the outcome of a case. Where, as here, an appeal is based on the contention that insufficient evidence exists, the appellate court would be deciding no more than that sufficient evidence exists to go to trial; it is quite possible that the public official would still succeed on the merits at trial.

merit. Nevertheless, the resolution of this question was treated by the Court in *Siegert* as a proper subject of interlocutory appeal. *See Siegert*, 500 U.S. 226.

The Court's decisions therefore demonstrate that a qualified immunity issue may both implicate the factual record and decide "the merits" of the case without losing its "collateral" character under *Cohen*. The adjudication of a public official's entitlement not to stand trial is properly viewed as collateral to the merits because it determines a distinct right belonging to the public official, regardless of the extent to which the merits are directly implicated in that adjudication. Given this, there is no basis for denying a public official an interlocutory appeal of a denial of qualified immunity, simply because of the legal reason for that denial.

3. *To Make The Availability Of Interlocutory Appeal From A Denial Of Qualified Immunity Turn On The Legal Reason For The Denial Would Produce Incongruous And Inequitable Results*

The Court has emphasized that "the finality requirement should 'be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.' " *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976)). Yet to disallow interlocutory appeal from denials of qualified immunity simply because they are premised on the "wrong" type of legal error would do just that. Such a distinction between different types of legal errors for purposes of appealing a denial of qualified immunity would deny public officials a right this Court has described as central to the protection of qualified immunity—the right not to stand trial on insubstantial claims.[13]

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[13] Ironically, such a rule would weaken public officials' protection from frivolous lawsuits in precisely those circumstances in which the public official has acted on firm constitutional and statutory

Worse, such a distinction would perpetuate uncertainty among public officials as to the scope of protection provided them by the qualified immunity doctrine. Instead of being free to act within the protected zone of conduct defined by qualified immunity, secure in the belief that his or her right not to stand trial in insubstantial cases will be protected, the public official will be faced with uncertainty and risk. *See* Schuck, *Suing Our Servants*, 1980 S.Ct. Rev. at 325-27. A single error by a trial court as to the existence of a genuine issue of fact is sufficient to strip away the public official's protection against frivolous lawsuits, subjecting the official—and the community which that official serves—to the considerable costs and burdens of trial. This risk can be expected not only to dissuade some public officials from taking necessary action, but also to deter capable persons from seeking public service at all. *See id.* at 326 ("Qualified immunity undercuts vigorous decision making to the extent that its availability cannot be readily established."); *Harlow*, 457 U.S. at 814.

The social cost of litigation against public officials is demonstrated by the fiscal burdens which it places on local government. According to a 1992 survey conducted by the National Institute of Municipal Law Officers, over 80% of the responding jurisdictions reported increased litigation costs during the preceding two years, with the heaviest budgetary impacts falling disproportionately on the poorest jurisdictions and "the cities at each end of the size continuum." Susan A. MacManus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 834, 836 (1993). Specifically, police liability cases and civil rights cases were identified as "contributing

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ground; comprehensive protection from the burdens of trial would be available only to the extent the official's actions fell within the "gray areas" in which the law is unclear. *See Unwin*, 863 F.2d at 133 n.9 ("To afford the two defendants immunity only if the law had been a little less favorable to them would seem ridiculous.").

most to their rising litigation costs over the past three years." *Id.* at 839.[14]

Making appeal from a denial of qualified immunity unavailable where that denial is based on a determination that genuine issues of material fact exist could encourage strategic behavior on the part of plaintiffs, who might fill the record with insupportable assertions in the hope of manufacturing a factual dispute that would preclude summary judgment.[15] Because even plainly insubstantial claims take a good deal of time and money to litigate, a defendant that is unable to terminate the litigation at an early stage may settle the case rather than litigate it, even if ultimate success appears certain.[16] To the extent that erroneous denials of public officials' entitlement not to stand trial are unreviewable, plaintiffs' leverage in such cases is greatly enhanced, to the detriment of the public fisc.

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[14] A number of factors drive up the cost of these types of cases. For example, each such case "tends to be complex and quite lengthy," "frequently requires the use of outside counsel," and "tends to rely heavily on the testimony of expensive expert witnesses." MacManus, *The Impact of Litigation on Municipalities*, 44 Syracuse L. Rev. at 840.

[15] *See Turner*, 848 F.2d at 444 ("[i]t will seldom be difficult for a plaintiff to *plead* a violation of clearly established law"). *Cf. Anderson v. Creighton*, 483 U.S. at 640 n.2 ("[a] passably clever plaintiff would always be able to identify an abstract clearly established right that the defendant could be alleged to have violated").

[16] Rising costs of litigation have already led many municipalities to settle winnable cases as a cost containment measure. *See* MacManus, *The Impact of Litigation on Municipalities*, 44 Syracuse L. Rev. at 842 (81.4% of respondents "acknowledge they settle at least some of their 'winnable' cases just to save money"); *see also* International City/County Management Association, *Law Enforcement Officials Liability Insurance: Current Status—1991* 36 (1991) (analysis of closed liability insurance claims reveals "that the median defense cost[] is twice the median settlement cost").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

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J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
LAWRENCE P. FLETCHER-HILL
Assistant Attorneys General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6330

*Counsel of Record
[additional counsel listed on inside cover]

BEST AVAILABLE COPY

28pp

JEFF SESSIONS
Attorney General of Alabama
State House
11 South Union Street
Montgomery, AL 36130

BRUCE M. BOTELHO
Attorney General of Alaska
Post Office Box 110300
Dimond Courthouse
Juneau, Alaska 99811

GRANT WOODS
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007

WINSTON BRYANT
Attorney General of Arkansas
323 Center Street
Little Rock, Arkansas 72001

DANIEL E. LUNGREN
Attorney General of
California
1515 K Street, Suite 1511
Sacramento, California 95814

GALE A. NORTON
Attorney General of Colorado
1525 Sherman Street
Denver, Colorado 80203

RICHARD BLUMENTHAL
Attorney General of
Connecticut
55 Elm Street
P.O. Box 129
Hartford, Connecticut 06141

M. JANE BRADY
Attorney General of Delaware
820 N. French Street
Wilmington, Delaware 19801

MICHAEL J. BOWERS
Attorney General of Georgia
40 Capitol Square, S.W.
Atlanta, Georgia 30334

MARGERY S. BRONSTER
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

ALAN G. LANCE
Attorney General of Idaho
P.O. Box 83720
Boise, Idaho 83720

JAMES E. RYAN
Attorney General of Illinois
100 West Randolph Street
Chicago, Illinois 60601

PAMELA CARTER
Attorney General of Indiana
402 W. Washington Street
Indianapolis, Indiana 46204

THOMAS J. MILLER
Attorney General of Iowa
Hoover State Office Building
Des Moines, Iowa 50319

CARLA J. STOVALL
Attorney General of Kansas
Judicial Center, 2nd Floor
Topeka, Kansas 66612

CHRIS GORMAN
Attorney General of Kentucky
State Capitol, Room 116
Frankfort, Kentucky 40601

RICHARD P. IEYOUB
Attorney General of Louisiana
P.O. Box 94095
Baton Rouge, Louisiana 70804

SCOTT HARSHBARGER
Attorney General of
Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

FRANK J. KELLEY
Attorney General of Michigan
525 West Ottawa
Lansing, Michigan 48909

BEST AVAILABLE COPY

HUBERT H. HUMPHREY III
Attorney General of
Minnesota
102 State Capitol
St. Paul, Minnesota 55155

MIKE MOORE
Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
P.O. Box 899
Jefferson City, Missouri 65102

JOSEPH P. MAZUREK
Attorney General of Montana
Justice Building
P.O. Box 201401
Helena, Montana 59620

DON STENBERG
Attorney General of Nebraska
State Capitol
P.O. Box 98920
Lincoln, Nebraska 68509

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Capitol Complex
Carson City, Nevada 89710

JEFFREY R. HOWARD
Attorney General of
New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

DEBORAH T. PORITZ
Attorney General of
New Jersey
25 Market Street, CN080
Trenton, New Jersey 08625

TOM UDALL
Attorney General of
New Mexico
Post Office Drawer 1508
Santa Fe, New Mexico 87504

MICHAEL F. EASLEY
Attorney General of
North Carolina
2 East Morgan Street
Raleigh, North Carolina 27602

HEIDI HEITKAMP
Attorney General of
North Dakota
600 East Boulevard
Bismarck, North Dakota 58505

BETTY D. MONTGOMERY
Attorney General of Ohio
30 East Broad Street
Columbus, Ohio 43215

W.A. DREW EDMONSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard
Oklahoma City, OK 73105

THEODORE R. KULONGOSKI
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310

ERNEST D. PREATE, JR.
Attorney General of
Pennsylvania
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania 17120

JEFFREY B. PINE
Attorney General of
Rhode Island
72 Pine Street
Providence, Rhode Island 02903

CHARLES MOLONY CONDON
Attorney General of
South Carolina
1000 Assembly Street
Rembert C. Dennis Building
Columbia, SC 29211

MARK BARNETT
Attorney General of
South Dakota
500 East Capitol
Pierre, South Dakota 57501

DAN MORALES
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

JAN GRAHAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

JEFFREY L. AMESTOY
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609

JAMES S. GILMORE, III
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219

CHRISTINE O. GREGOIRE
Attorney General of
Washington
P.O. Box 40100
Olympia, Washington 98504

JAMES E. DOYLE
Attorney General of Wisconsin
123 West Washington Avenue
Madison, Wisconsin 53707

JOSEPH B. MEYER
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002

GARLAND PINKSTON, JR.
Acting Corporation Counsel
441 4th Street N.W.
Washington, D.C. 20001

PEDRO PIERLUISI
Attorney General of
Puerto Rico
P.O. Box 192
San Juan, Puerto Rico 00902

CALVIN E. HOLLOWAY, SR.
Acting Attorney General of
Guam
120 West O'Brien Drive
Agana, Guam 98910

QUESTION PRESENTED

Whether, in an action under 42 U.S.C. § 1983, a public official may challenge on interlocutory appeal the denial of the official's motion seeking summary judgment on qualified immunity grounds when the plaintiff has failed to adduce any evidence of wrongful conduct.

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Pursuant to Sup. Ct. R. 37, the forty-five signatory States, the District of Columbia, the Commonwealth of Puerto Rico, and the Territory of Guam respectfully submit this brief as *amici curiae* in support of petitioners.

INTEREST OF *AMICI CURIAE*

This case presents an important question concerning the right of state officials to appeal immediately orders denying them summary judgment on the basis of qualified immunity. Resolution of the question is of major significance to the states because it will in many instances determine the full effectiveness of the qualified immunity defense available to state officials in actions brought under 42 U.S.C. § 1983. That defense, of immediate, personal importance to the individual officials sued in a particular case, provides a valuable benefit to the states by removing a disincentive to entry into state service and by promoting the vigorous discharge of public duties.

The restriction of immediate appeals of qualified immunity rulings would undermine the very reasons for the immunity defense. The specter of protracted litigation and potential personal liability would deter able individuals from entering state service and would hamper independent and vigorous decisionmaking by those serving as state officials. Engagement in litigation also would unduly distract public servants from productive service. Denying an immediate appeal and forcing state officials to proceed with discovery and trial would impose litigation expenses on states which extend representation to certain officials at public expense.

Allowance or disallowance of immediate appeals based on whether the issues presented are predominantly "legal" or "factual" would institute a meaningless and unworkable distinction. The vast majority of state officials, particularly law enforcement officers, function in a daily environment dominated by complex and

varying facts, not abstract law. Their decisions rarely, if ever, turn on purely legal considerations. As an effective response to this reality, the qualified immunity doctrine has evolved to embody an objective test not only of abstract legal principles, but of the application of law to facts. In the same way, the companion doctrine permitting immediate appeals will be effective only if it comprehends the entire range of qualified immunity defenses.

STATEMENT

Petitioners Tyson Johnson, Robert Deevey, and John Payne are police officers in Villa Park, Illinois. On November 6, 1990, they responded to assist a fellow officer, John Heidelmeier, with respondent Houston Jones. Before the three petitioners and one other officer, Genaro Esposito, arrived at the scene, Officer Heidelmeier had discovered respondent Jones, apparently intoxicated, hitting his head against a building. An altercation between Jones and Officer Heidelmeier occurred as the officer attempted to arrest and handcuff Jones for disorderly conduct. The petitioner officers assisted Officer Heidelmeier in handcuffing Jones. After Jones arrived at the police station, he was treated for trauma, including several broken ribs. Pet. App. 4a-5a.

Respondent Jones sued all of the officers in the United States District Court for the Northern District of Illinois under 42 U.S.C. § 1983. He alleged in part that the officers used excessive force against him both at the scene of the arrest and subsequently at the police station and that they were liable for illegal arrest, false imprisonment, and malicious prosecution. Jones claimed that he was not intoxicated but was suffering an adverse

insulin reaction. He disclaimed any memory of the alleged attack, stating that he could only remember experiencing pain and seeing Officers Heidelmeier and Esposito at the police station. Pet. App. 4a-6a.

All of the officers moved for summary judgment on the basis of qualified immunity. The petitioners submitted sworn statements that no one beat, struck, or abused Jones during the arrest; that their involvement with Jones ended after the arrest was made; and that they saw no one abuse Jones at the police station. With respect to the false arrest and related claims, petitioners argued that their qualified immunity was established by the existence of probable cause to arrest Jones. Pet. App. 4a-5a, 8a.

The district court denied the motions for summary judgment. Pet. App. 8a-10a. With respect to the alleged use of excessive force, the court concluded that circumstantial evidence might support respondent's theory of the case, even though he was unable to advance any witness to support his allegations. Pet. App. 7a-8a. The court decided that the false arrest claim should be tried because the excessive force claims required a trial and "there is substantial overlap between the claims of excessive force and lack of probable cause, and because there is at least some possibility plaintiff could prove lack of probable cause . . . ." Pet. App. 9a-10a.

The three petitioners sought immediate review of the district court's denial of qualified immunity. The Court of Appeals for the Seventh Circuit dismissed the appeal on the excessive force claim for lack of jurisdiction, opining that "[a] cry of 'we didn't do it'

does not present any distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity." Pet. App. 1a-2a. The circuit court took a different tack with respect to the issue of lack of probable cause. Finding it undisputed "that an officer found plaintiff, apparently intoxicated, hitting his head against a building, and took him into custody," the court concluded that "[t]hese facts imply disorderly conduct, which supports an arrest." Pet. App. 2a. Respondent could not adduce sufficient evidence to dispute the officers' account of the arrest, and the officers' version of the arrest, "if accepted, entitles them to immunity if not to prevail outright." Pet. App. 2a. The court rejected the district court's view that summary judgment nevertheless should be denied on the false arrest claim because the excessive force allegations had to be tried. Pet. App. 2a-3a. The court reasoned that the policy considerations favoring resolution of immunity claims as early in litigation as possible compelled entry of summary judgment on the false arrest claims against petitioners. Pet. App. 3a.

Petitioners sought a writ of certiorari from the Court to review the Seventh Circuit's dismissal of their immediate appeal on the excessive force claim.

SUMMARY OF ARGUMENT

The qualified immunity doctrine exists to promote effective government by giving public officials protection against the distorting influences of potential personal liability. The doctrine, as reformulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is designed to facilitate early disposition of qualified immunity claims on summary judgment. In *Mitchell v. Forsyth*, 472 U.S.

511 (1985), this Court held that the same important considerations supporting the doctrine also require that pretrial rulings denying qualified immunity be immediately appealable.

The right of immediate appeal recognized in *Mitchell* applies to all assertions of qualified immunity, not just those that might be described as focusing primarily on "legal" issues. Indeed, this Court acknowledged explicitly in *Mitchell* that qualified immunity would be appropriate in a case in which the defendant official relies on the plaintiff's inability to adduce any evidence that the official took any action contrary to plaintiff's rights. There is no basis in this Court's decisions to permit immediate appeals in only certain types of qualified immunity cases.

The distinction the Seventh Circuit imposed between "legal" and "factual" qualified immunity cases runs counter to the interests supporting immediate appeals. It would deprive some officials of the right to escape protracted discovery and trial, despite the fundamental nature of those officials' defense. The distinction also would prove to be unworkable and would lead to inconsistent and unfair results because there are no clear lines between qualified immunity defenses that are predominantly "legal" and those that are predominantly "factual." The distinction is not even likely to lead to any reduction in appellate litigation because the distinction itself will produce litigation over the appealability of certain issues.

This Court should clarify that the right of immediate appeal recognized in *Mitchell* applies to all pretrial denials of qualified immunity regardless of how

the district court's decision might be characterized. The Seventh Circuit's dismissal of petitioners' appeal on the excessive force claim should be reversed and the case should be remanded for consideration of the merits of the appeal on that issue by the court of appeals.

ARGUMENT

AN IMMEDIATE APPEAL OF A PRETRIAL RULING ON QUALIFIED IMMUNITY SHOULD ENCOMPASS ALL BASES ON WHICH QUALIFIED IMMUNITY MAY BE GRANTED.

A. The right of immediate appeal from a decision denying qualified immunity is integral to the policies of the doctrine of qualified immunity.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court redefined the test for qualified immunity of government officials, rejecting a partly subjective standard in favor of a purely objective test. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. This purely objective standard is inextricably tied to its procedural utility. It is designed to "avoid excessive disruption of government and [to] permit the resolution of many insubstantial claims on summary judgment." *Id.*

Qualified immunity exists "to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Wyatt v. Cole*, 112 S.Ct. 1827, 1833 (1992); *see also Harlow*, 457 U.S. at 814. Among the social costs of damage actions against public officials are "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. Qualified immunity reduces "perverse incentives that operate to *inhibit* officials in the proper performance of their duties." *Forrester v. White*, 484 U.S. 219, 223 (1988) (emphasis in original). Without an effective immunity doctrine, officials facing the threat of potential personal liability "may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Id.*; *see also Harlow*, 457 U.S. at 814.

The Court's primary concern in *Harlow* was the "substantial costs [that] attend the litigation of the subjective good faith of government officials," which was then an element of the qualified immunity doctrine. *Id.* at 816. In addition to the "general costs" associated with exposing public officials to the risks of trial and liability, the subjective inquiry exacted "special costs" because "questions of subjective intent so rarely can be decided by summary judgment." *Id.* at 817. Wide-ranging discovery into, and subsequent trial of, the subjective motivations of government officials is "peculiarly disruptive of effective government." *Id.* at 817.

Since *Harlow*, this Court has held steadfastly to the central goal of ensuring that qualified immunity remains available as a viable means of disposing of suits at the summary judgment stage "unless [an officer's] conduct was unreasonable in light of clearly established law." *Elder v. Holloway*, 114 S.Ct. 1019, 1021 (1994). *See also Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Qualified immunity thus provides an "accommodation for reasonable error," *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 537 (1991), which protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 1793 (1991). "Immunity ordinarily should be decided by the court long before trial." *Hunter*, 112 S.Ct. at 537.

The same public interest in achieving expeditious disposition of assertions of qualified immunity provides the rationale both for the objective nature of the qualified immunity test and for the immediate appealability of qualified immunity decisions. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985); *Wyatt v. Cole*, 112 S.Ct. at 1832-33. Decisions denying qualified immunity thus fit within the narrow limits of the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *Mitchell*, 472 U.S. at 524-25. Pretrial qualified immunity decisions warrant this special status because "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is

erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original).

B. Immediate appeals of qualified immunity rulings are not limited to cases in which the defendant emphasizes legal over factual arguments.

This Court in *Mitchell* anticipated this case. Just as the doctrine of qualified immunity encompasses a fundamental legal argument — the assertion that even the facts alleged do not amount to violation of a legal right — so also qualified immunity reaches the correspondingly fundamental factual defense: "Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." 472 U.S. at 526. This is precisely petitioners' claim here: Notwithstanding his allegations, respondent cannot prove petitioners' involvement in any use of excessive force. The well established principles applicable to motions for summary judgment permit petitioners to put respondent to his proof on this issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). This Court gave no hint in *Mitchell* that this type of qualified immunity defense, recognized there as firmly within the scope of the doctrine, would for some reason be excluded from the immediately available appeal afforded by *Mitchell*.

Even if *Mitchell* were less clear on this point, the evolution of the qualified immunity doctrine has not

produced limiting distinctions between "legal" and "factual" arguments. Contrary to the Seventh Circuit's view, assertions of qualified immunity are not limited to situations like *Mitchell* in which a defendant government official can identify a particular case decided subsequent to his conduct which settles a legal right for the first time — what might be termed the classic "legal uncertainty" paradigm.[1] More often in qualified immunity cases, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 111 S.Ct. at 1793. Such cases do not rest on any notion of legal uncertainty at all. The defendant does not claim to have reasonably misunderstood the law at one time; the official asserts more fundamentally that the law has never proscribed his conduct, clearly or unclearly.

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[1] The essential facts in *Mitchell* were straightforward and uncontested: The Attorney General had authorized a warrantless wiretap in the exercise of the President's authority relating to national security, and conversations involving Forsyth had been intercepted. 472 U.S. at 513-14. The Attorney General's claim of immunity was deemed to turn on the "purely legal question" whether the prohibition of warrantless wiretaps in the name of national security was clearly established in 1970-71. *Id.* at 530. This Court concluded that that right was not clearly established until *United States v. United States District Court for the Eastern District of Michigan, Southern Division*, 407 U.S. 297 (1972), was decided, after the wiretap at issue was concluded.

That these types of cases emphasize analysis of law does not mean that they do not depend on particular facts. In *Mitchell*, this Court expressly recognized that "the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief . . . ." 472 U.S. at 528. The question whether a clear right has been violated at all will almost always depend on consideration of the underlying facts. *See, e.g., Davis v. Scherer*, 468 U.S. 183, 192 (1984) (not unreasonable for officials to conclude they had complied with fundamentals of due process in terminating employee based on specific factual demonstration that employee had several opportunities to present his position to his superiors).

Anderson v. Creighton, 483 U.S. 635 (1987), teaches that a court considering an official's assertion of qualified immunity must traverse the full range of the law-fact spectrum. The inquiry cannot be limited to a level of abstract legal generality. To do so would upset the balance carefully calibrated in *Harlow* and transform the objective legal reasonableness test "from a guarantee of immunity into a rule of pleading." 483 U.S. at 639. "The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Id.* at 640 (emphasis supplied). A court cannot consider "what an official is doing" without engaging in a particularized factual inquiry as part of the qualified immunity analysis.

The full scope of qualified immunity is most apparent in cases involving law enforcement officers. Police officers, without the benefit of full legal training, are called upon frequently to make difficult judgments in circumstances in which the outcome of the issue depends

on fine distinctions of fact or law.[2] Their task often is complicated further by the need to act "in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). The evaluation of probable cause, for example, involves a prototypical law/fact judgment: the application of broad legal rules and elements to a constantly and minutely varying set of circumstances. That qualified immunity applies fully in this setting is clear beyond peradventure. Law enforcement officers who "reasonably but mistakenly conclude that probable cause is present" are entitled to qualified immunity. *Anderson v. Creighton*, 483 U.S. at 641. The inquiry does not become any less objective because it "will often require examination of the information possessed by the searching officials." *Id.* On an assertion of qualified immunity, a court is engaged to answer "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.*; *see also Hunter v. Bryant*, 112 S.Ct. at 537 ("court should ask whether the agents acted

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[2] "Such officials as police officers or prison wardens . . . routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.'" *Davis v. Scherer*, 468 U.S. at 196 (quoting P. Schuck, Suing Government 66 (1983)). "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974).

reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact").[3]

C. Any restriction of immediate appeals based on their relative legal or factual emphasis would undermine the purposes of the qualified immunity doctrine and prove to be unworkable.

The Seventh Circuit viewed petitioners' assertion that "we didn't do it" as an insufficiently "legal" defense because it does not rely on "legal uncertainty," which the court characterized as "the genesis of doctrines of official immunity." Pet. App. 1a-2a. As demonstrated above, however, qualified immunity is not limited to cases of classic legal uncertainty.[4] It applies equally to

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[3] Decision of such qualified immunity issues on summary judgment will not always be possible or appropriate. There are cases in which there are genuine disputes about the information the officers had at the time they acted, but the simple fact that an official was called upon to make judgments about a set of facts does not inevitably produce a triable issue. *Hunter v. Bryant*, 112 S.Ct. at 536-37. The right to an interlocutory appeal remains essential in this and all other types of denials of qualified immunity to ensure that public officials are not required to defend protracted litigation if a district court erroneously denies summary judgment.

[4] It is not clear whether the Seventh Circuit means to exclude fact-based defenses entirely from the realm of qualified immunity defenses or whether it recognizes them as

the more fundamental claim that the right asserted by the plaintiff has never been established. That defense — "we did it, but it isn't illegal" — is simply the complement at the legal end of the spectrum to the equally fundamental factual defense of "we didn't do it." Both of these formulations fit under the umbrella of qualified immunity, which can be captured in the phrase, "what we did was not clearly illegal." Moreover, primarily fact-based assertions of qualified immunity will not always be as simple as "we didn't do it." Federal Rule of Civil Procedure 56 permits a defendant to argue a mixture of undisputed facts and acceptance of the plaintiff's version of certain facts.[5] The distinction the Seventh Circuit attempts to impose will prove unworkable as the boundaries of law and fact and assumed fact become blurred.

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assertions of qualified immunity but would exclude them from permissible immediate appeals. Either approach is erroneous.

[5] Thus, for example, one police officer might argue that, even accepting the plaintiff's allegations of fact, probable cause existed to make an arrest and the officer therefore is immune. Another police officer might argue that her version of the facts is true and the plaintiff cannot prove facts to the contrary. A third officer might offer that all of the plaintiff's allegations but one can be accepted as true and that the plaintiff can adduce no evidence to support the single disputed contention. If the plaintiff fails to advance competent proof of the one issue, summary judgment certainly is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. at 324. There is no principled basis to distinguish among these varying situations to declare that an immediate appeal should not be available in one or more of them.

The Court need not look far for an example of the irrationality of the proposed distinction. At the same time it was rejecting jurisdiction of petitioners' excessive force appeal, the Seventh Circuit reversed the district court's denial of qualified immunity on the false arrest and related claims. The argument on those claims, however, was no more "legal," and it certainly was not based on "legal uncertainty." Rather, it was a fact-based defense similarly predicated on respondent's inability to produce any evidence that the officers had any information that would detract from their reasonable conclusion that they had probable cause to arrest respondent for disorderly conduct. No principled distinction can be drawn between a conclusion that the undisputed facts provided the officers a reasonable basis to proceed with an arrest and a determination that virtually the same information provided the officers with a reasonable basis to conclude that it was necessary to exert force to overcome respondent's resistance to their efforts to place him under arrest. Whatever might be said for a conclusion of no disputed facts on the former point and a genuine dispute of fact concerning the reasonableness of the extent of the force exerted on the latter point, there can be no justification for the position that the former point can be appealed immediately while appeal on the latter issue cannot even be entertained.

The approach adopted by the Seventh Circuit would fragment the qualified immunity doctrine, at least with respect to immediate appealability. This Court has sought to preserve the doctrine's consistent set of principles:

> [W]e have been unwilling to complicate qualified immunity analysis by making the

> scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide.

Anderson, 483 U.S. at 643. Variations in the appealability of pretrial qualified immunity orders would be no less destructive to the integrity of the doctrine.

The Seventh Circuit's attempt to exclude all but "legal uncertainty" qualified immunity cases from immediate appeals not only restricts the range of proper qualified immunity defenses, it also irrationally elevates one aspect of the test — legal uncertainty — above the doctrine itself and the central policy of expeditiously disposing of those cases which can be decided on summary judgment. If the Seventh Circuit's approach were to prevail, an official who is mistakenly identified by a plaintiff and who did nothing wrong at all, on an erroneous failure by a district court to recognize the official's complete lack of participation, could be held to answer through discovery and a full trial without an opportunity to appeal. Another official, who actually violated a citizen's rights but who is immune because of not yet fully evolved law at the time of the wrong, could invoke his right to an immediate appeal, which would enable him properly to escape the burdens of protracted litigation. Such a distinction runs counter to the policies at the core of the qualified immunity doctrine.

At most, limiting immediate appeals in this manner would prune from the circuit courts' dockets a certain number of appeals, but even that saving of judicial resources would prove ephemeral. First, there is no indication that this category of cases is numerous or presents any special burden on the courts of appeals. Second, any argument premised on saving judicial resources must consider both the district courts and the circuit courts. When qualified immunity is granted on appeal, the judicial system as a whole is spared extended litigation, including the far greater burden of a trial in the district court. Only when immediate appeals lacking merit are taken will there be any ultimate cost, and that is a cost which this Court has already deemed appropriate in light of the greater benefits to society as a whole of permitting immediate qualified immunity appeals. Finally, the Seventh Circuit's distinction will spawn additional appellate litigation over the immediate appealability of qualified immunity decisions. Whatever limited savings in appellate litigation might be achieved likely would be negated by this additional litigation, which is entirely unproductive from the standpoint of the social costs to be avoided by the qualified immunity doctrine.

CONCLUSION

For the reasons stated, the decision of the court of appeals should be reversed and this case should be remanded with instructions that the court of appeals consider the merits of petitioners' appeal on the excessive force claims.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
LAWRENCE P. FLETCHER-HILL
Assistant Attorneys General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6345

Counsel for the *Amici* States,
the District of Columbia, and
the Commonwealth of Puerto Rico

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